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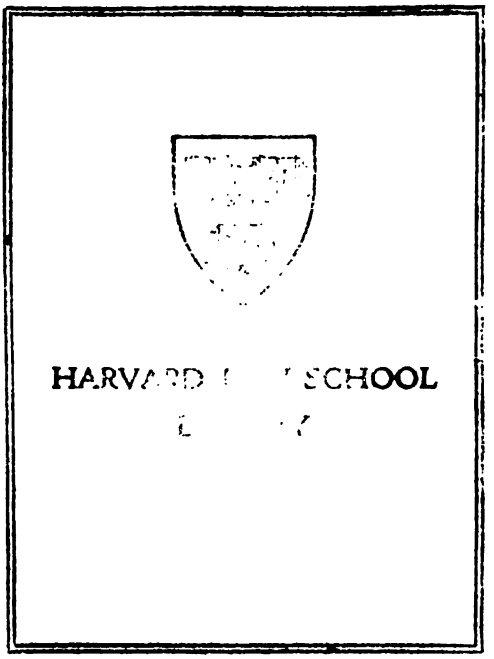
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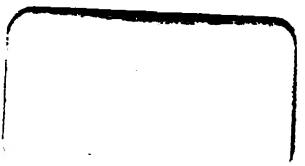

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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

By NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XXXVII.

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PRACTICE REPORTS.

SUPREME COURT.

ALBERT E. MILLER agt. MARY E MILLER.

Motion papers to set aside a judgment of divorce granted by default, and for leave to the defendant to come in and defend, are properly served on the *attorneys for the plaintiff* in the judgment, although made nearly two years after the entry of judgment, and after the attorneys for the plaintiff had settled with their client, and they themselves had dissolved partnership.

Jefferson Special Term, November, 1867.

B. F. CHAPMAN, *for defendant*,

Moved to set aside the judgment for divorce in this case, and for leave to serve an answer and defend the action.

It appeared by the judgment roll, and affidavits, that on the 24th November, 1865, the plaintiff obtained a judgment of divorce against the defendant by default. Service of the summons was made by publication, and at the time of service the defendant was acting as a surgeon in the army of the United States. She had no knowledge of the proceedings or judgment until in August, 1866, while on her way to Europe, she casually heard of it.

On her return home in September, 1867, she immediately made, and had prepared the necessary papers for a motion to open her default and allow her to come in and defend the action.

The motion papers were served upon the plaintiff's attorneys who had procured the judgment of divorce.

D. M. K. JOHNSON, *one of plaintiffs attorneys,*

On whom the motion papers were served appears on the motion, for the sole purpose of objecting to the sufficiency of the service, showing by affidavits of himself and his former law partner, that immediately after the decree was obtained, they had settled with the plaintiff and ceased to be his attorneys; also, that the plaintiff's attorneys had dissolved partnership before the motion papers were served; also, that the plaintiff had married again since he had obtained said decree.

B. F. CHAPMAN, *in reply,*

Insisted, that when a judgment is sought to be set aside, so as to interpose a defense on the merits, the attorney who obtained the judgment, is the proper person on whom the papers should be served. (*Citing, Drury* agt. *Russell*, 27 *How. Pr. R.*, 130; *also, Lusk* agt. *Hastings*, 1 *Hill R.*, 662.)

MULLIN, J. The plaintiff in November 1865, obtained a judgment of divorce from the defendant, his wife, by default, by reason of her adulterous intercourse with other men. Service was made by publication, and at the time of the service, the defendant was acting as a surgeon in the army of the United States.

She now moves to set aside the judgment, and for leave to come in and defend, and has served the papers for the motion on the attorneys of the plaintiff, by whom the action for the divorce was obtained.

The attorney thus served appears on the motion, solely for the purpose of objecting to the sufficiency of the service. If, therefore, the service is sufficient, the motion is not opposed, and the defendant is entitled to the relief asked, on proof of the service of her motion.

Two years had not elapsed when the motion papers were served.

The general rule at common law was that the authority of the attorney in an action ceased with the recovery of a judgment. (1 *M. & P.*, 513 *Graham's Pr.*, 47.)

Notwithstanding this limitation, it was held that his authority continued until execution issued (8 *J. R.*, 361), and still further until the payment of the debt. But he could not acknowledge satisfaction without a new warrant. (10 *J. R.*, 220.) But the Revised Statutes changed the law, and authorized the attorney to acknowledge satisfaction at any time within two years from the entry of judgment. (2 *R. S.*, 362, § 24, 1*st ed.*)

The power of the attorney has been held to continue for two years, so that a notice of appeal served upon him, was as effectual as upon the party, (*Tripp* agt. *DeBow*, 5 *How. Pr. R.*, 114, *and the authorities cited*). See also the remarks of COWEN, J., in *Lusk* agt. *Hastings*, (1 *Hill*, 656,) *Bracket* agt. *Norton*,(4 *Conn.*, 522,) *Winans* agt. *Mason*, (21 *How. Pr. R.*, 153,) *Lee* agt. *Brown*, (6 *J. R.*, 132,) *Wardell* agt. *Eden*, (1 *John. Cases*, 121.)

The case of *Drury* agt. *Russell*, (27 *How. Pr. R.*, 130) is directly in point, and decisive of the question. In that case six years had elapsed after judgment, yet service on the attorney held regular.

I have looked into the affidavits to see whether the place of residence of the plaintiff was known. The defendant says she understands his home to be Cortland. Mr. Johnson, the attorney, says he was told by plaintiff he was going west on a lecturing tour; that he had addressed a letter to him at Cortland where his sister resides, and by whom plaintiff's letter was forwarded to him, but he (J.), had not received an answer.

It is obvious that service by mail would not be likely to reach the plaintiff, so that no benefit would result from resorting to that mode of service.

Upon the authority of the cases cited, I entertain no doubt but that the service in this case was regular.

In this and in all similar cases of service upon an attorney, so long after entry of judgment, the court, upon his affidavit showing that he had made dilligent effort to inform his client of the service of papers and had failed, would upon his application, postpone the hearing for a reasonable time, so that the client might be notified, and in this way, injustice to both parties be avoided.

The attorney, thinking the service irregular, did not make the request, and of course, no postponement was granted.

The motion is granted, but it must be upon paying $10, costs of the motion, and the costs of the cause after service of the complaint, an answer to be served within twenty days.

N. Y. SUPERIOR COURT.

JOHN DOUPE agt. SINDNEY C. GENNIN.

Where a lease of a building and premises for a term of years, contains a mutual covenant on the part of the landlord and tenant, that in case the premises are so damaged by accidental fire, as to make them untenantable for more than thirty days, the rent shall cease at the option of the tenant until the premises shall be repaired, and no covenant on the part of the landlord to repair, nor any other express covenant on his part; on a partial destruction of the premises by fire, the landlord is not responsible to the tenant for damage to his property, by exposure to the elements, or otherwise, by not making immediate repairs after the fire.

A subsequent *parol promise* to repair, made by the landlord, is not good unless supported by a sufficient consideration.

The tenant's remedy in such a case is under the covenant in the lease, to require an abatement of the rent until the premises are repaired.

General Term, January, 1869.

THE defendant was the owner of the building, No. 707 Sixth avenue, in this city. He rented the store and basement to the defendant for a term of five years and ten months, and the upper part of the building to one Trenor, for a dancing-hall. A fire occurred in an adjoining building, which communicated with the upper part of the defendant's building, consuming the roof and most of the building above the first story.

The complaint alleged that the defendant covenanted, by and in the *giving* of the lease, that the plaintiff should have quiet, peaceable, and full use of the store and basement during the term; and that the part of the building above the store would be kept in such repair and order that the plaintiff could safely, and without damage, use and occupy the store and basement for his business, and could safely keep upholstery and furniture and similar property therein.

The lease to the plaintiff, which was set out in the defendant's answer, contained no such covenants as were alleged in the complaint. It did, however, contain a coven-

ant *on the part of plaintiff*, to keep the demised premises, during the term, in good and substantial repair, and to give and surrender the premises, at the expiration of the term, in as good and substantial repair and condition as reasonable use and wear thereof would permit, damages by *accidental fire* excepted. And there was a mutual covenant, that in case the premises were so damaged by accidental fire as to make them untenantable for more than thirty days, the rent should cease *at the option of the plaintiff*, until the premises should be repaired.

The complaint further alleged, that the roof of the building was nearly destroyed, so that the store of the plaintiff had no cover or protection against rain and storm, and that the property of the plaintiff therein, was injured by rain and snow. That the plaintiff demanded of the defendant that the roof should be immediately repaired, and his property protected from damage by the elements, and that he promised to do so. That several days of clear weather occurred next after the fire, during which the defendant could have temporarily repaired the roof, so as fully to have protected the plaintiff's property; but that the defendant neglected so to do, and the plaintiff's property was exposed for two and a half months to rain and snow falling upon the building, and coming through the ceiling of the plaintiff's store, injuring his property, and rendering the store and basement unfit for use.

The answer alleged that the building was damaged to such an extent by the fire as to render it wholly untenantable for sixty days thereafter.

The action was tried by Mr. Justice BARBOUR, and a jury.

On the trial it was proved that the defendant commenced repairing the roof some eighteen days after the fire; that no temporary roof or covering was put up to protect the plaintiff's store and property; that such temporary roof or covering might have been put up which would have protected

the plaintiff's property. The repairs were not completed until two and a half months after the fire, during which time the plaintiff's property in the store was injured by rain and snow, and he was otherwise injured, in being deprived of the use and enjoyment of the premises.

A motion to dismiss the complaint on the ground that no cause of action had been shown against the defendant, was denied, and the defendant excepted.

There was evidence given on the part of the defendant, tending to show that the whole roof was burnt, except a small portion in front; the upper stories, in front, were substantially destroyed, and nothing was left but the walls and the stores on the first floor and the basements; that the defendant was dilligent in making the repairs, and the delays, if any, were owing to the severity of the weather.

At the close of the evidence the defendant again moved to dismiss the complaint, on the ground that, there being no covenant in the lease to repair, the landlord was not bound to repair, and was not liable for damages. The motion was again refused and the defendant excepted.

The court charged the jury, "that it was the duty of the defendant, immediately after the occurrence of the fire, so soon, at least, as a prudent and careful man would do it, if the whole thing belonged to him—the property in the store and all—just as soon as a prudent and careful man would, to go on and reconstruct the building—that is, put on the roof, and save the things from the storm; and after commencing the work, he should have carried it forward with reasonable and proper and customary vigilance until it was completed. If he failed to do that, and the water penetrated the store of the plaintiff, because of any improper delay in putting on the roof, on the part of the defendant, he is liable for the damage so caused."

The defendant excepted to the charge.

The jury rendered a verdict for the plaintiff, assessing the damages at fifteen hundred dollars.

The defendant appealed.

J. E. PARSONS, *for appellant.*
JAMES EMOTT, *for respondent.*

By the court, MONELL, J. The lease of the plaintiff contained a covenant on his part to keep the premises in repair during the term. There was no covenant to repair on the part of the landlord, nor any other covenant on his part, except the covenant relating to the abatement of rent during the time the premises might be made untenantable by fire.

A covenant of quiet and peaceable enjoyment may, however, be implied (*Mayor of New York* agt. *Mabie*, 13 *N. Y. R.*, 151), but a mere interruption of the use and enjoyment of the premises, consequential upon repairs being made of other parts of the building, without an actual entry upon the demised premises, and an eviction, actual or constructive, of the tenant therefrom, would not be a breach of such covenant. In *Gardner* agt. *Keteltas*, (3 *Hill*, 330), which was an action for not being put into possession of the demised premises, the covenant was construed to mean, that the lessor shall have such a title as shall enable him to give a free and unincumbered lease for the term demised, but that there was no warranty against the acts of strangers. In *Howard* agt. *Doolittle*, (3 *Duer*, 464), it is said that the covenant means that the tenant shall not be evicted by a paramount title; that it relates only to the *title*, and not to the actual possession or undisturbed enjoyment, where there is no eviction from the premises demised. And a tresspass committed by the lessor was held not to be an eviction (*Levy* agt. *Bond*, 1 *E. D. Smith*, 169; *Taylor L. and T.*, 124).

In the case of *The Mayor of New York* agt. *Mabie* (*supra*), where the covenant was held to have been broken, by an unlawful interference by the lessor, with the enjoyment of the premises, by the lessee, the lessor had entered upon

the premises, and assumed the entire control thereof, under a claim of right, amounting to an eviction. It was not intended in that case to extend the force of the covenant beyond a protection to the lessee against the unlawful entry of the lessor himself, and it is clearly intimated that the entry must be under an assumption or claim of title to the premises. Otherwise it would be a mere trespass and not a breach of the covenant.

The covenant of quiet enjoyment is not broken by the landlord's neglecting or refusing to keep the premises in repair. The letting implies no obligation by him that the premises shall be or shall continue fit for the use for which the tenant designed them (*Howard* agt. *Doolittle, supra*), or even that they are or shall be tenantable (*Cleves* agt. *Willoughby*, 7 *Hill*, 83; *Sherwood* agt. *Seaman*, 2 *Bosw.*, 127; *Post* agt. *Vetter*, 2 *E. D. Smith*, 284).

There does not seem, therefore, to be any covenant of the defendant, express or implied, upon which this action can rest, the only covenant suggested by the plaintiff's counsel being the implied covenant of quiet enjoyment, which the cases I have cited show very clearly is not broken by any of the acts of the lessor complained of in this case.

The covenant of the plaintiff to pay rent, without a special agreement to the contrary, would have continued after the fire, except for the statute of 1860 (*Sess. Laws, ch.* 345, *p.* 592; *Gates* agt. *Green*, 4 *Paige*, 355; *Willard* agt. *Tillman*, 19 *Wend.*, 358; *Howard* agt. *Doolittle, ubi supra*). By that statute a tenant is discharged from the payment of rent after the destruction by fire of the demised premises, and the lease is terminated, So that, if the fire had rendered the buildings wholly untenantable, the plaintiff could have availed himself of the provisions of the statute, and surrendered possession; or, under the covenants in the lease, have required an abatement of the rent until the premises were repaired. In the one case, the lease would have been an-

nulled, the term ended, and the covenant to pay rent discharged; in the other, the rent only would have ceased until the premises were repaired. If the plaintiff continued to hold the possession, he must be deemed to have held under his lease, and to be subjected to all its burdens.

A subsequent parol promise to repair would be good, if supported by a sufficient consideration (*Post* agt. *Vetter*, *ubi supra*). Or, if the defendant had entered upon the demised premises to make repairs, under the reservation of such right in the lease, and had made them in a wanton, or unskilful, or even negligent manner, he might be liable (*Turner* agt. *McCarthy*, 4 *E. D. Smith*; 547.) But there was no consideration whatever for the promise which the plaintiff proved, nor was there any entry upon the plaintiff's premises, nor any injury resulting from the repairs.

I have not, therefore, been able to find any obligation, express or implied, on the part of the defendant, either in the lease or the parol promise, the breach of which would constitute a cause of action; nor do I understand that the case was put to the jury upon any such grounds.

The jury were charged that it was the *duty* of the defendant to make the repairs immediately after the fire. But whether such duty was imposed by any legal obligation contained in the lease, or arose from the mere relation which the parties bore toward each other, of landlord and tenant, irrespective of any covenant or promise, the jury were not told. But they *were* instructed, that if the defendant failed to make the repairs, he was liable.

I have endeavored to show, that the charge to the jury is not supported by any legal obligation resting on the defendant under the lease; nor upon any subsequent promise to repair; nor for trespass, by entry upon the plaintiff's premises.

Is there any other principle of law on which it can be sustained?

There is a class of wrongs known as *misfeasances*, for which remedies are provided. In those cases, however, the injury must be the direct result or effect of the act complained of. The mere omission to do a thing, which a person is not required to do, would incur no liability (*Thorn* agt. *Deas*, 4 *John. R.*, 84). But if the thing is undertaken to be done, and is done improperly, a right of action arises.

The defendant was under no legal obligation to repair the building; and had he chosen, he could have left it as it was at the end of the fire, and would, at most, have lost the rent for the remainder of the plaintiff's term. But the building might have remained unroofed to the present time, without the defendant incurring any responsibility for any injury to the plaintiff's possession or property. The plaintiff had his remedy. He could have removed his property, surrendered his possession, and canceled his lease; or, if he preferred to occupy the premises in the condition the fire left them, he could abate the rent.

The injury complained of was caused by water and snow coming through the ceiling into the plaintiff's store, and it is not even claimed that the flow was increased by any thing done in rapairing the roof, If, therefore, the defendant had wholly omitted to replace the roof, and the plaintiff had continued to occupy his store, the injury might have continued to the present time. How then can the defendant be liable for not doing, within a reasonable time, a work which he was *not* bound to do at all, especially where the injuries complained of resulted from the *omission* and not from the *manner* of doing it?

The case differs from *Turner* agt. *McCarthy* (*ubi supra*), where the lessor entered for the purpose of making repairs, and they were made in a wanton and unskilful manner, and were the direct and immediate cause of damage to the lessee's property. It also differs from *Edgerton* agt. *Page* (20

N. Y. R., 281), where the injury to the lessee's property was the direct result of the lessor's acts.

I cannot perceive in what respect a partial injury of the premises could give a greater or better claim upon the defendant than if there had been a total destruction, in which latter event, I presume it will not be contended, that the landlord would be bound to rebuild, or that he would be responsible for damage to the plaintiff's property, by exposeure to the elements or otherwise,

There may be some principle which I have not been able to discover, upon which this judgment can be upheld. Those suggested by the respondent's counsel are, none of them, in my opinion, sufficient.

My conclusions require a *reversal* of the judgment, and the ordering of a new trial, with costs to the appellant to abide the event.

JONES and FITHIAN, JJ., concurred.

NEW YORK COMMON PLEAS.

Solis agt. Manning.

The *evidence* upon which a charge of malice in procuring an arrest; the *circumstances* attending the arrest, and the *annoyances* to which the plaintiff was subjected in making the arrest, can not be *pleaded* in an action for damages for an alleged malicious arrest.

Special Term, March, 1868.

Motion to strike out part of a complaint. The action was for damages for an alleged malicious arrest. The plaintiff pleaded all the circumstances attending the arrest and the petty annoyances to which he was subjected.

Sewell & Pierce, *for the motion.*
D. D. Lord, *opposed.*

Barrett, J. The cases of *Eddy* agt. *Beach* (7 *Abb. Pr. R.*, 19), and *Shaw* agt. *Jayne* (4 *How., Pr. R.*, 119), are decisive of the two first branches of this motion. They clearly hold that the evidence upon which a charge of malice in procuring an arrest is based, cannot be pleaded. Malice is a fact and should be pleaded as such. The circumstsnces attending the arrest, although of themselves distinct acts, are still but the evidence in support of the alleged fact of malice.

As to the remaining count, the annoyances therein specified are not pleaded by way of special damage; but even if so pleaded, their proof, instead of establishing the right to any such damages, could only tend to aggravate the ordinary damages which naturally and necessarily result from the alleged wrong. Such matters as stated by Judge Daly, in *Moloney* agt. *Dows*, (15 *How. Pr. R.*, 265, 266,) (citing

numerous cases), are allowed to be given in evidence to show the *quo animus;* but they are never pleaded. These views are not in conflict with those expressed in *Brockleman* agt. *Brandt* (10 *Abb. Pr. R.*, 141). The matter there sought to be stricken out, and which was regarded as an averment of special injury, consisted of a statement that the defendant had maliciously procured a publication concerning the arrest, which was libelous. The damages resulting from such a publication, although springing from the arrest, are not its legitimate consequences. They flow from an independent act, distinct from the arrest itself, although based thereon, and involving consequences of a more extended character than such as naturally result therefrom. It is eminently proper that such damages should be specially pleaded, and they are plainly distinguishable from those sought to be spread upon the present record.

The motion must be granted with $10 costs, with leave to the plaintiff to serve an amended complaint within ten days upon payment of such costs.

SUPREME COURT.

WILLIAM, EARL OF CRAVEN, and another agt. JOHN S. PRICE,

Where an action is brought for wrongfully cutting grass, and converting the hay from premises which the plaintiffs claim as owners in fee, and entitled to the possession thereof, which possession is alleged to be wrongfully withheld from them; and the defendant in his answer admits the title to the land to be in the plaintiffs as alleged, but claims that he was rightfully in possession of the premises, and had a right to cut and dispose of the hay under the *license and permission of the plaintiffs*, by virtue of an executory contract to purchase the land, the *title to land* does not arise in the case. And if the plaintiffs recover a verdict of $15, only, the defendant is entitled to costs.

Erie General Term, November, 1867.

Before DANIELS, MARVIN *and* DAVIS, *Justices.*

APPEAL from order of special term denying motion for retaxation of costs.

C. W. BRANDT, *for plaintiffs.*
HAKES & STEVENS, *for defendant*

By the court, MARVIN, J. The plaintiffs in their complaint allege that they were the owners in fee of certain land described; and that one Albert G. Brown, wrongfully withheld possession from them and cut an severed certain grass from the land and made it into hay; that the hay was the property of the plaintiffs, and the defendant took and converted it.

The defendant, in his first answer, admitted the title to the land in the plaintiffs as alleged; second answer—a denial of all the other allegations in the complaint; third answer—alleges that the plaintiffs had a right to the possession of the land, and that Brown was lawfully in possession, under license and permission of the plaintiffs, and those who were the owners thereof prior to the plaintiffs,

under and by virtue of an executory contract for the purchase of the land, with the license and permission of the plaintiffs in said Brown to the possession, and rents, and profits thereof, and that while so in possession, Brown cut the hay as he lawfully might, and sold it to one Ewers, who transferred it to the defendant, who took it away as he lawfully might. The plaintiffs had a verdict for $15 00, and the clerk taxed costs in favor of the defendant.

Does a claim of title to real property arise on the pleadings in this case? It is argued that the third answer raises the question of title, as it states that Brown was lawfully in the possession of the lands, under the license and permission of the plaintiffs, *and those who were the owners thereof prior to the plaintiffs*, under and by virtue of a contract for the purchase of the lands, with the license and permission of the plaintiffs in said Brown to the possession, and rents, and profits thereof. What does the pleading here mean? It is claimed that under the allegations here made, the defendant on the trial would have been permitted to prove title in prior owners, and a contract with Brown for the purchase of the land, and license to possess the land, &c. The defendant, however, says Brown was in possession under the license and permission of the plaintiffs and those who were the prior owners, under a contract, &c., with the license and permission of the plaintiffs. Brown's possession was under the license of the plaintiffs, and if other persons who were previous owners, assented thereto, how could that affect the question of license? Again Brown was in possession under a contract to purchase, with the license and permission of the plaintiffs. The license and permission of the plaintiffs for what? Clearly, to possess. The defendant did not propose by his answer to defend upon the ground that Brown was rightfully in possession, under and by virtue of a contract to purchase the land of some prior owner, simply, but he avers that his possession was under the li-

cense and permission of the plaintiffs. The fair construction of the answer is, that Brown's possession and right to cut, and dispose of the hay, was under the license and permission of the plaintiffs. I think the order appealed from should be affirmed, with $10 costs.

N. Y. SUPERIOR COURT.

EDWARD MOORE, plaintiff, agt. PATRICK DEVOY, defendant.

In an action for assault and false imprisonment, an *answer* of the defendant, after denying all the facts set forth in the complaint, alleges, as a distinct defense "by way of justification and mitigation, that whatsoever acts he committed in relation to the plaintiff, at the times and places specified in the complaint, were done without malice and in due discharge of his office, as deputy sheriff, and not otherwise," is impertinent and irrelevant, and constitutes no defense whatever.

Heard, Special Term, January, 1869.
Decided, January 26, 1869.

DEMURRER to answer. This is an action for an assault and false imprisonment. The defendant denies each and every allegation of the complaint, and, *secondly*, avers, as a separate and distinct offence, "by way of justification and mitigation, that whatsoever acts he committed in relation to the plaintiff at the times and places specified in the complaint were done without malice and in due discharge of his office as deputy sheriff, and not otherwise." The plaintiff demurs to this second defense so set up in the answer.

A. H. REAVY, *for plaintiff.*
W. F. HOWE, *for defendant.*

BARBOUR, J. The defendant had a right to confess the assault and imprisonment charged in the complaint, and avoid liability therefor, by an averment of sufficient facts to constitute a legal justification. But an answer, which, after denying all the facts set forth in the complaint, alleges that whatever was done by the defendant was done by him as a deputy sheriff, is not only duplex, but the latter allegations are wholly impertinent and irrelevant, and constitute no defense whatever.

Besides, the facts, stated in the answer, that the defendant was a deputy sheriff and that what he did was done in the performance of his duty as such, do not amount to a justification for the alleged assault and imprisonment, in the absence of an averment that he acted under and in pursuance of process duly issued by a proper court or officer or for the purpose of preventing or suppressing a breach of the peace, or of arresting a person whom he had reason to believe to be a felon in a case where a felony had actually been committeed. Indeed, I am not aware of any instance where a sheriff or other officer can legally arrest, imprison, or assault a man, without due process of law, in which any other citizen may not lawfully do the same thing.

The demurrer must be sustained, with costs to the plaintiff.

NEW YORK COMMON PLEAS.

ALEXANDER TURNBULL *et al.*, plaintiffs and respondents, agt. JOHN T. MARTIN, defendant and appellant.

An *award of arbitrators*, made without disagreement, should not be lightly disturbed —certainly not without some evidence of fraud, corruption, partiality or unfairness.

That the arbitrators received as testimony on the plaintiff's behalf some *ex parte* affidavits; and that they refused to permit the defendant to inspect those parts of plaintiff's books in respect to which testimony was being given, are not sufficient grounds (even if not denied) to disturb the award.

General Term, January, 1869.

Before Judge DALY, *and Judges* BRADY *and* BARRETT.

The facts are sufficiently stated in the opinion.

A. J. VANDERPOEL, *for appellant.*

EDWARDS PIERREPONT and FOSTER & THOMSON, *for respondents.*

By the court, BARRETT, J. This case comes before us upon an appeal from a judgment entered on the award of arbitrators. The arbitration bonds were executed after the joining of issue between the parties in an action brought in this court. The dispute was in respect to a quantity of flannel, and the bonds provided for the submission of all the matters arising under the pleadings to two dry goods merchants, one chosen by each of the parties, with the additional proviso that the umpire, in case of disagreement, should also be chosen from among the dry goods commission merchants. The arbitrators were attended by the respective parties in person, and without counsel, and thus the whole matter was completely withdrawn from the court and placed exclusively in the hands of laymen, specially chosen by the parties from the

class most conversant with the subject matter of the controversy. The award was in favor of the plaintiffs, and was made without disagreement, and consequently, without the necessity of calling in an umpire. An award, under such circumstances, should not be lightly disturbed; certainly not without some evidence of fraud, corruption, partiality or unfairness. Nothing of the kind is suggested here, and the only grounds upon which a reversal is claimed are, first, that the arbitrators received as testimony on the plaintiff's behalf some *ex parte* affidavits, and, second, that they refused to permit the defendant to inspect those parts of the plaintiff's books in respect to which testimony was being given. These objections are not well founded in fact, as will presently be shown; but were they clearly established, the acts complained of do not amount to such misconduct or misbehavior as would justify us in setting aside the award. The statute, by these terms, "misconduct" and "misbehavior," (2 R. S., 542, sec. 10,) contemplates acts evincing unfairness, or contrary to all the principles of a just proceeding, such as those discountenanced in *Walker* agt. *Frobisher*, (6 *Ves., Jun.*, 70), and in *Knowlton* agt. *Mickles*, (29 *Barb.*, 465), and not mere errors of judgment, however great. (*Smith* agt. *Cutler*, 10 *Wend.*, 589; *Ketchum* agt. *Woodruff*, 24 *Barb.*, 147; *Cranston* agt. *the heirs of Kenny*, 9 *Johns.*, 212; *Herrick* agt. *Blair*, 1 *Johns., ch. R.*, 101). Arbitrators are bound by no technical legal rules. They have a right to proceed informally and in such a manner as, without violating those self-evident and fundamental principles upon which every fair investigation must be conducted, best tend to enlighten their judgment and enable them, in their way, to arrive at the truth and merits of the controversy. The rule which would vitiate an award whenever affidavits are, although openly and without any unfair or dishonest purpose, received by the arbitrators and estimated according to the value which their judgment may place upon them, would produce the same result, were the decision par-

tially based upon a perso nal inspection, by the arbitrators themselves in the presence of both parties, of the goods or articles claimed to be inferior. The short answer to all the arguments adduced in support of such a rule is, that the parties have agreed to remove their controversy from the regular tribunals where justice is administered in an orderly manner and in accordance with precise and well-settled rules, and have submitted to such judgment as their chosen merchant-peers may pronounce after a simple and informal investigation, conducted according to the layman's ideas of common sense, and at which honesty and impartiality are alone contracted for or desired. These views are based upon the assumed correctness of the facts stated in the defendant's affidavit. His statements, however, are explicitly denied by the plaintiff, Turnbull, who explains that the affidavits were merely marked by the arbitrators for identification, and that the question whether they were to be entirely disregarded or received for what they were worth was reserved. There is no evidence as to the final disposition of this question, and thus it does not appear that the affidavits were ever in reality considered. The point in respect to the books is met by the same plaintiff, who states in answer to the averment upon that head in the defendant's affidavit, that the arbitrators did "allow him, (the defendant) if he wished, to inspect all the entries as to which evidence was given." The remaining objection, that the arbitrators refused to receive evidence on behalf of the defendant, as to the contents of the books, is not substantiated even by the defendant; for he merely says that he desired to introduce such evidence, without intimating, however, that he expressed his desire or that it was refused. The judgment and order denying the motion to vacate the award should be affirmed with costs.

SUPREME COURT.

WILLIAM M. CLINTON agt. JOHN EDDY.

It is not in "furtherance of justice," to allow a party, who has omitted to plead the statute of limitations in bar to a counter-claim, to serve a reply as an amended pleading, in order to avail himself of the statute.

When a party omits to plead the statute of limitations, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed as having elected to stand upon the other defenses which he made to the demand on the trial, and will not be allowed to abjure such election.

Such an amendment after judgment does not come within the terms of either §173 or §174 of the Code, and would be a stretch of the power therein conferred upon the court.

Tioga Special Term, February, 1869.

MOTION by the plaintiff to open a judgment entered against him upon the report of a referee, and for leave to discontinue an appeal therefrom brought to the general term, and to serve a reply in the action, and for a re-hearing before the referee, &c. The facts are sufficiently set forth in the opinion of the court.

JAMES E. DEWEY, *for motion.*
E. COUNTRYMAN, *contra.*

PARKER, J. This action was brought to recover upon three several causes of action.

1. Damages for non-attendance of defendant as a witness for plaintiff in an action in this court in obedience to a subpoena.

2. To recover plaintiffs share of certain moneys belonging to plaintiff and defendant jointly, which it is alleged were paid over to defendant in the year 1854.

3. An account against defendant for board and tuition of defendants daughters at plaintiffs seminary.

The answer denies the material allegations in the complaint, and sets up the statute of limitations to the second cause of action. Also alleges that the plaintiff received defendants share of the moneys mentioned in the second cause of action, together with his own, and claims to recover of plaintiff in this action defendants said share of said moneys and interest. Also sets up other demands against the plaintiff as an offset—about which there seems to be no controversy.

No reply was put in by the plaintiff to any part of this answer.

The cause was referred and tried before the referee. On the trial the defendant raised the point that the claim made by him in his answer to recover his share of the moneys therein alleged to have been received by plaintiff, was a counter-claim, and not having been replied to, stood admitted upon the record. This view was controverted by the plaintiff, who insisted that it was not a counter-claim and required no reply. The referee decided that the defendant's claim did not stand admitted, and allowed both parties to give evidence upon, and litigate the question, whether the transaction in reference to said moneys was as claimed by the plaintiff in the second count of his complaint, or by defendant in his answer, in respect thereto.

The referee in regard to this question found upon the evdence in favor of defendant, and allowed him the benefit of his share of the said moneys so received by the plaintiff, being with interest the sum $75.38, which, with other moneys found due from the plaintiff to the defendant, over-balanced the plaintiff's demands as established upon the trial by the sum of $8.10, for which he ordered judgment for the defendant.

Judgment was thereupon perfected for defendant, October 1, 1868, and from this judgment the plaintiff on the 24th

day of November, 1868, perfected an appeal to the general term.

A motion is now made by the plaintiff for an order upon such terms as may be just, relieving the plaintiff from this judgment, and allowing a reply to be made to said claim of the defendant, thus allowed him as a counter-claim, and referring back the case to the referee to determine the same as though the reply had been put in by leave of the court when the question arose upon the trial as to the necessity of a reply, and allowing the testimony as far as taken, to stand in full force, and further relieving the plaintiff by allowing him to discontinue his said appeal.

The affidavits on the part of the plaintiff, state, that when the question was raised by the defendant upon the trial, whether or not, his claim to recover his share of the moneys in which plaintig and defendant were jointly interested, and which he alleged had been received by plaintiff, was a counter-claim requiring a reply; plaintiff's counsel stated to the referee, that it should be held by the referee, that such claim was a counter-claim requiring a reply, he, the plaintiff, would move to be allowed to amend his pleadings and for leave to put in a reply; and that the referee overruled the defendants objection to the plaintiff's going into proof upon the second count of his complaint and that a reply was unnecessary.

It is therefore insisted that the plaintiff was *misled* by the action of the referee in holding upon the trial that no reply was necesary, and yet in his decision giving the defendant the benefit of a demand as a counter-claim, which a reply of the statute of limitations would have prevented.

The defendant's affidavits—after to some extent contradicting the statement that the plaintiff's counsel declared to the referee their intention to move for leave to reply in case the referee held a reply necessary—go on to state that in submitting the case to the referee, the plaintiff's counsel insisted that defendant's claim for his share of the moneys re-

ceived by plaintiff as aforesaid, was barred by the statute of limitations, while defendant's counsel claimed that plaintiff could not avail himself of that statute without having pleaded it in a reply. That after the cause was submitted, the referee informed the counsel for both parties that he had concluded to find upon the facts in favor of the defendant, but was undecided upon the question of the statute of limitations, and would give both sides an opportunity to be heard on that question, by submitting briefs thereon. That the counsel on both sides, accordingly, did submit briefs on that point, and, as involved in the inquiry, upon the question whether defendant's said claim was a counter-claim.

The referee, after such arguments, held, as above intimated, that a reply of the statute was necessary in order to the plaintiffs' availing himself of it, and although the defendants claim had not accrued within six years before the commencement of the action, allowed it to him in the judgment given.

I think the allegation of the plaintiff, that he was misled by the action of the referee, is answered by the fact, that before the decision of the question as to the necessity of a reply, to give him the benefit of the statute of limitations, he was notified that the question was an open one and placed with respect to it in the same condition which he occupied before the evidence was closed. If, upon the trial, he was in a position to move for leave to put in a reply, he was still so, upon being informed by the referee that the question as to the necessity of a reply, was still open. Then, instead of conceding the necessity of a reply and taking steps to obtain leave to plead the statute, he denied such necessity and argued in support of his position before the referee. He does not stand in a position to allege that the action of the referee misled him, so that he was thereby *prevented* from applying for leave to reply, but rather in the position of resting upon the sufficiency of his pleadings,

and deliberately submitted his case, with that distinct question to the decision of the referee.

It seems to me that it would be a stretch of the power of amendment to allow the one now asked for. It does not come within the terms of either § 173 or § 174 of the Code.

It is not a case, where the plaintiff has become surprised or misled after exercise of ordinary care and skill, nor do I think the amendment asked for, is clearly required in order to promote the ends of justice. (8 *How.*, 303; 6 *Bosw.*, 674.) Each party claimed of the other, before the referee, his share of the money in question, each alleging that the other had received the whole of it. This question was litigated by them before the referee *ad libitum*, and he found that the plaintiff had received the whole, and had not paid defendant his share. To allow the plaintiff now to come in, not as a right, but as a favor, and plead the statute of limitations against the allowance to defendant of what the referee finds justly due him, and in regard to which there is no pretence that it is not justly due him, does not seem to me to be "in furtherance of justice." It is to be remembered that the lapse of six years between the accruing of the cause of action and the commencement of the action, is not a bar to the action, unless the party against whom the cause of action exists, chooses to make it so. In suffering the action to go on without replying the statute, he is on this motion to be deemed as having elected to stand upon the other defenses which he made to the demand, on the trial, and should not now be allowed to abjure such election.

The only proper mode of attacking the judgment is by the appeal which he has taken.

The motion should be denied with $10 costs.

Motion denied.

SUPREME COURT.

CHARLES E. BLEECKER and others agt. JAMES G. SMITH.

An affidavit to change the venue, is sufficient, where it states that the witnesses reside in the county. It is unecessary to specify the city, town or village.

Albany May Circuit, 1869.

HOGEBOOM, *Justice.*

MOTION by defendant to change the venue to Cortland County.

The affidavit of defendant stated "that Frank M. Benjamin" and others "all of the county Cortland" were material witnesses for him. This was the only specification of the residence of the witnesses. It contained the other usual statements.

EDWARD J. MEEGAN, *Counsel for plaintiffs*

Claims that the affidavit was defective as it failed to specify the city or town or village in which each witness resided. That the general statement of the county was not enough, and cited *Westbrook* agt. *Merritt*, (1 *How., Pr. R.*, 195); *Cook* agt. *Finch* (2 *id.* 89); and *Van Auken* agt. *Stewart* (2 *id.* 181):

FRANK M. BENJAMIN, *for defendant.*

HOGEBOOM, J., said: I think where the affidavit specifies the county in which the witnesses reside, it complies with the requirements of the law.

I do not regard it as necessary to specify the city, village or town. I shall therefore overrule the objection to the affidavits and hear the motion.

Motion heard on the merits and a reference ordered.

N. Y. SUPERIOR COURT.

THE NEW HAVEN and NORTHAMPTON COMPANY agt. EDWARD A. QUINTARD, *et al.*

Under section 158 of the Stamp Act of June 30, 1864, the omission to affix a proper stamp does not avoid an instrument unless such omission was with intent to evade the provisions of the act.

Therefore one who seeks to exclude from being given in evidence an instrument by reason of its invalidity in not being properly stamped must show affirmatively that the omission was with the intent to evade the provisions of the act.

But, if the burden of proving the absence of such intent was on the party offering the instrument, still, if it be received by the court under the general objection that the want of a proper stamp renders it invalid, a judgment will not be reversed by reason of such reception.

As the defect arising from the want of a proper stamp could have been remedied by evidence as to the intent of the omission, the objection, to be tenable (in case of reception), must be placed on the ground of the absence of such evidence.

General Term, January, 1869.

ODELL, *for appellant.*
CADWALADER, *for respondent.*

By the court, JONES, J. (After disposing of other points in this case). Another objection urged, is that the agreement was not properly stamped under the United States stamp act.

The stamp act applicable to this case is that of June 30, 1864, which took effect August, 1864, and the point arises under the 158th section of that act, which is as follows:

"SEC. 158. And be it further enacted, that any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft or order, or promissory note for the pay-

ment of money, without the same being duly stamped or having thereon an adhesive stamp for denoting the duty chargeable thereon, *with intent to evade the provisions of this act*, shall, for every such offence, forfeit the sum of two hundred dollars; and such instrument, document, or paper, bill, draft, or order, or note, shall be deemed invalid and of no effect."

The point is not well taken for two reasons.

1. There is no evidence that the omission to affix the proper stamp was *with intent to evade the provisions of this act.* It is necessary that the omission should be *with such intent* in order to invalidate the instrument; and the burden of proving such intent lies on the party seeking to invalidate the agreement in this case.

1. Even if the burden of proof was upon the plaintiff, yet the defendant cannot now take advantage of the defect of proof; for on his motion of a non-suit he did not call the attention of the plaintiff to such defect. If he had, it might have been supplied. He claimed, on the motion for a non-suit, that the bare omission of the stamp of itself invalidated the agreement. This was his only claim, and in this he was in error.

MONELL, J. One of the questions in this case is whether the contract was invalid by reason of not being stamped, as required by the 158th section of the act of Congress of June 30, 1864. That section provides that any person who shall make any instrument, &c., "without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, *with the intent to evade the provisions of this act,*" shall forfeit, &c., and such instrument "*shall be deemed invalid and of no effect.*"

The instruments which formed the contract in this case were six several letters, written by the parties respectively, commencing on the 23d of April, and ending on the 13th of December, 1864; and the plaintiff proved that in April,

1865, after the commencement of the action, they placed the required revenue stamp upon *one* of the letters addressed to them by the defendants which letter contained the offer of the defendants to sell to the plaintiff the coal in question.

The form of the contract in this case illustrates one of the difficulties in the practical working of the Revenue Stamp Act. Where an entire agreement is included in one instrument, signed by the respective parties, the letter of the act can be complied with; but where the agreement consists of separate instruments, each signed by one party only, at a different time, or, as in the case before us, of six letters, written at intervals, during a period of eight months, and where no contract is formed until the last instrument is signed and delivered, or the last letter is sent and received, it is difficult to determine when, or upon which of the several instruments the revenue stamp shall be placed. I do not understand the act to require that each of the several parts of the agreement shall be stamped, but merely that each sheet or piece of paper upon which it is written shall be stamped; and yet in no other way could there have been in this case a compliance with the statute.

The language of the act is, that "any person who shall make, sign, or issue * * * any instrument, document, or paper, of any kind or description whatsoever, shall forfeit, &c. This language would indicate that each of the separate parts of an instrument, when signed, shall be stamped; so that a written offer to sell must be stamped at the time it is written or sent, although it has not been and may never be accepted, and until acceptance it is of no force or effect. But there are other parts of the act which, in effect, define the meaning of any "instrument, document, or paper."

The stamp required is one "denoting the duty chargeable thereon," and the several kinds of instruments, &c., are designated, and the duty prescribed. Thus, among others, "agreement, contract, or appraisement," require, for each

sheet or piece of paper on which the same is written, a stamp of five cents. A contract, therefore, is an "instrument" affected by the section of the act before referred to, and although when made, each sheet or piece of paper on which it is written must be stamped, yet the act nowhere requires such stamp to be affixed while the contract is merely inchoate. Otherwise, it would be necessary to affix a stamp when each of the incipient writings when written, and to cancel them, as required by the act. Yet such incipient writings, with canceled stamps thereon, may not become a part of any contract, as where a written *offer* to sell is not accepted or agreed to. The sensible construction of the act would seem to be, that a contract *when formed* shall be stamped upon each sheet with the required stamp. Of course the act relates to *written* instruments only. A *parol* contract is not within its provisions.

The act declares that an instrument not so stamped shall be deemed invalid and of no effect, and as it is required to be so stamped at the time the instrument is made, the invalidity relates to the time of making. It is therefore, at least, very questionable whether a subsequent affixing of a stamp would render a contract valid, unless it was affixed in the manner provided by the amendment of the 158th section, by the act of March 3, 1865. I do not, however, propose to examine that question, for it seems to me very clear that the contract in this case was not invalid and of no effect, unless the omission to affix a proper stamp thereon was *with intent to evade the provisions of the act.*

Nor is it important to consider the amendment of July 13, 1866, which provides that no instrument required to be stamped, which has been signed or issued without being stamped, shall be admitted in evidence, until a stamp shall have been affixed thereto. In this case the stamp was affixed before trial. Besides, the amendment referred to merely excludes the instrument from being read in evidence, but does not affect its validity.

This brings me to the principal question namely, upon whom the burden lies of showing such intent.

As respects the *penalty*, the act casts the burden upon the party seeking its remission to prove there was no intent to to evade the law; but the causes which render a contract invalid are left to be established in such manner and by such party as, according to the rules of pleading or of evidence, is usual.

A party objecting, as an unvarying rule, is deemed to hold the affirmative, and must furnish the necessary evidence to predicate the objection. Therefore, if it is objected that an instrument is void, by reason of its not being stamped, the objector must show that the omission of the stamp was with intent to evade the revenue law.

The section is very clear on this subject. Any person who shall make any instrument, and shall, *with intent to evade the law*, fail to affix thereon a proper stamp, shall forfeit, &c., and such instrument shall be invalid. The fraudulent intent is the offense, and if none exists there is no penalty.

In all cases of penalty or of crime the law presumes innocence, and guilt must be established to secure conviction. The Revenue Act is a penal statute, and if an action was necessary to obtain the fine, no one will doubt that it would be necessary for the government to *show* a fraudulent intent to repel the presumption of innocence. No such action, however, is required, the government being authorized to collect the penalty in the manner that other revenue is collected.

There are two quite different effects resulting from omitting to affix a revenue stamp upon a contract or other instrument. One inures to to the government, and the other to individuals; but they do not arise from the same cause. The forfeiture or penalty, which belongs to the government, is incurred whenever a person makes an instrument, and omits to stamp it, and the penalty may be, as before stated,

collected without action. But if such person seeks a remission of the forfeiture, *he* must satisfy the collector of his innocence of any design to defraud the revenue. Where the effect, however, of omitting the stamp inures to individuals, the omission must be connected with a fraudulent design, which the party seeking to avail himself of the effect must establish by competent proof.

The revenue act is like our statute concerning fraudulent conveyances, which renders void every conveyance made with the intent to hinder, delay or defraud creditors. To avoid a conveyance under that statute, the *onus* is upon the creditor to establish the fraudulent intent. Indeed, under any statute which, for stated reasons, renders a contract or other instrument void, the attacking party holds and must prove the affirmative. A note void for usury, or under the gaming laws, or for an insufficient consideration, or contracts *contra bonus mores*, must be shown to be void for these reasons, by the party setting up the objection. Yet in those cases the statute declares the instruments to be void for these reasons only.

If I am correct in the construction of the act, the objection of the appellant's counsel, that the plaintiff failed to prove a *valid* contract, is not sound. I think I have shown that something more than failure to affix a stamp was necessary to invalidate the contract, namely, that the act of omission was with a fraudulent design. I have also, I think, shown where the *onus probandi* lies. The production of an unstamped contract is proof of a *legal* contract, and is sufficient proof until its invalidity is shown by bringing it within the provisions of the act. The rule of strict construtions of a penal statute has no application to that part of the revenue act which merely renders contracts void, and a clear discrimination is made between the two cases. Congress did not intend, nor does the act require, that the usual rules of evidence should be changed. Had there been such intent,

provision would have been made for relieving parties, as are made in respect to the penaly.

In the case of *Beebe* agt. *Hutton*, (47 *Barb.*, 187), it is intimated that it is incumbent upon the party claiming the benefits of a contract to establish his innocence of any fraudulent design. While I fully concur in most of the views so ably expressed in the very learned opinion in that case, I must dissent from the point to which I have referred, for the reasons which I have already stated. I see nothing in the statute which takes it out of the reason of the ordinary rule, which requires proof from the party holding the affirmative, not only because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable.

The case of *Vorebeck* agt. *Roe* (50 *Barb.*, 302), substantially sustains the views I have expressed. In the case of *Meyers* agt. *Smith*, (48 *Barb.*, 536), the court did not notice the very significant words in the act "with intent to evade," &c., but merely *assumed* that the contract was invalid, because not stamped.

My conclusion is, that an objection to a contract or other instrument because it is not stamped as required by the revenue laws, is unavailing, unless the *party objecting* prove that the stamp was omitted with intent to evade the act of congress, and that the mere failure or neglect to affix the stamp is not evidence of such intent.

Concurring in the views expressed by Mr. Justice JONES in this case, I am of opinion that the judgment, as modified by him, should be affirmed.

FITHIAN, J., concurred.

SUPREME COURT.

ANDREW F. WATERMAN agt. EMILY J. WATERMAN.

The *written consent* required by section 270 of the Code to refer an action for divorce, is sufficiently made; and the statute complied with, where an *order of reference* is drawn by the attorney for one of the parties and submitted to and approved by the attorney of the other party, reciting as follows:

"Upon the consent of the attorneys for each of the above parties given in open court, it is ordered that this action be and the same is hereby referred" &c.*

The Code does not allow of a reference, in an action of divorce or any other referable action, to take the evidence and report it to the court with the opinion of the referee merely; nor of any reference except for a trial of the issue in a case where an issue has been joined in the action.

Tioga Special Term, March, 1868.

MOTION to set aside order of reference and report of referee.

HENRY BENNETT, *for motion.*
JENKS & MATTERSON *opposed.*

PARKER, J. This action was brought for a divorce on the ground of the defendants adultery; the answer admits the marriage alleged in the complaint, but denies the adultery charged, and as an affimative defense sets up an alleged judgment of this court in a former action brought by this defendant against this plaintiff, divorcing her from him on the ground of his adultery.

At the Chenango Special Term on the 16th of July, 1867, an order of reference in the present action was made, of

*NOTE.—If this were an open question, it might not be difficult perhaps to sustain an opposite opinion from this and the other decisions sustaining it. Section 270 provides that "all or any of the issues in the action, whether of fact or of law, or both may be referred, upon the *written consent* of the parties."

Now there is an oral consent and a written consent; the latter consent is made by the statute, the basis or foundation of an order of reference—no order of reference

which the following is a copy. "This action being upon the special term calender and called in its regular order, upon the consent of the attorneys for each of the above parties given in open court it is ordered that this action be and the same is hereby referred to Wm. W. Mason, Esq., sole referee, to hear and decide the same;" a trial was had before the referee and he made his report finding as a fact "that that the defendant was not the wife of the plaintiff at the time of the commencement of this suit, and as a conclusion of law "that the defendant is entitled to judgment dismissing the plaintiff's complaint in this action with costs;" upon this report the defendants' attorneys entered up judgment without application to the court. The plaintiff thereupon moved the court at the Otsego Special term, held on the 16th of January, 1868, to set aside the judgment entered in this action by the defendants' attorneys, and the report of the referee and all proceedings subsequent to the report and for such further order as this court shall deem proper in the premises.

The court upon this motion ordered the judgment and all subsequent proceedings set aside, and that the decision "be without prejudice to a motion on the part of the plaintiff to modify the order of reference in this action."

At the Madison Special term held on the 3d day of February 1868, the defendant moved the court for judgment upon the report of the referee, and the plaintiff made a cross

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can properly be made without it. An oral consent is such an one as was made in this case, as the order recites it as given by the attorneys for each of the parties in *open court*. The important question therefore is, does the *recital* of this oral consent in the order of reference, constitute it a written consent within the meaning of the statute? It would seem that the answer to this question is almost too plain for argument; for the recital of the consent forms no part of the order of reference, but is recited as the foundation for the order, and the order must follow it in terms. The recital of the consent in the order cannot change the character of that consent, whether oral or written, therefore, the statute, as we suppose, contemplates that the written consent be filed with the clerk of the court as the foundation of the order of reference.

If any more potent argument were needed to sustain these views it is only necessary to refer to this case, where—the consent being oral—one of the attorneys al-

motion to set aside the report of the referee and for judgment in favor of the plaintiff, or for a further reference hearing and report or such other order as may be just and proper. Upon these motions the court made an order that the plaintiff's motion be denied; that the report of the referee be confirmed and directing judgment in favor of the defendant upon and in conformity with the report. The plaintiff having obtained an order staying defendants entry of judgment now comes to the court with a motion to set aside the order of reference and all subsequent proceedings on the ground that it is such an order as could not be entered or made, without a written consent of the parties or their attorneys and that no such written consent was given or for an order modifying said order of reference, so as to require said referee merely to take the evidence and report the same to the court with his opinion thereon, also to set aside the report of the referee on the ground that it does not determine all or any of the issues made by the pleadings and for such other and further order as may be proper.

The affidavits in behalf of the motion show that neither the plaintiff nor his attorney nor counsel ever signed any written consent to refer the cause. The affidavit of one of the defendants' attorneys shows that there was a parol agreement between himself and the attorney and counsel of the plaintiff to refer the cause to Mr. Mason. That he thereupon drew the order as entered and submitted it to both this attorney and counsel of plaintiff who expressed themselves satisfied with it, and thereupon in open court he moved for leave to enter the order in the presence of plain-

leges that it contained certain terms and conditions, and the order entered upon it did not express those terms; the other attorney denies this allegation and alleges the order to be correct; but unfortunately there is no written consent to refer to to settle the dispute—hence this motion—Had there been a written consent drawn expressing the precise terms of the reference, and signed by the respective attorneys or acknowledged by them in open court, which would probably be equivalent to signing, and filed or entered with the clerk, this motion never would have been heard of. We state these views (as we always intend to do, whether so expressed or not) with the utmost respect and deference to the decisions of the court—REP.

tiff's attorney and counsel, stating that it was assented to by them, and leave was granted by the court and the order entered. This statement is corroborated by the affidavits of both the attorney and counsel of the plaintiff, except that they insist that the arrangement was to refer the cause to Mr. Mason to take and report the evidence with his opinion, and that when the order was drawn and submitted to them, they stated that they understood the law to be that in divorce cases no referee could decide the issues and that defendants attorney stated that he so understood it, and they therefore forbore to object to the form of the notice. Defendant's attorney denies that the agreement was to refer the cause to the referee to take and report proofs with his opinion, but says that he refused to consent to any reference, except one to hear and decide the issues, and denies that when he submitted the order to said attorney and counsel, it was said by either of them or assented to by him, that the referee could not decide the issues.

The plaintiff's counsel insists upon his right to set aside the order of reference, on the ground that the proceeding in this court for a divorce is a statutory proceeding and therefore that every requirement of the statute must be fully complied with, so that when the Code (§ 270), provides that "all or any of the issues in the action whether of fact or of law, or both, may be referred upon the written consent of the parties;" a reference in a divorce case without such written consent is wholly unauthorized and void—that the question is a jurisdictional one and may be raised at any time, and that the express or implied assent of the plaintiff to the order entered, does not estop him from now repudiating it and moving to set it aside. The learned counsel goes further and insists that no reference to decide the issues in a divorce case can be made, because the power to grant divorces is confided by statute to the court and cannot be delegated by it to a referee, and that even a consent in

any form to a reference in such cases is not available to legalize such reference.

It is true that the authority of this court to grant divorces is derived from the statute. The title in the Revised Statutes which confers the authority, very plainly contemplates that such authority shall be exercised by the ordinary proceedings in a chancery suit, except when it makes specific provisions to the contrary, (2 *R. S.* 142, 149 1*st Ed.*) It does provide that in actions for divorce on the ground of adultery "if the offense charged be denied the court shall direct a feigned issue to be made up for the trial of the facts contested by the pleadings by a jury (2 *R. S.* 145, § 40 1*st Ed.*)

Under the Code, the requirement that the facts contested by the pleadings shall be tried by a jury is modified by § 253 as follows, "an issue of fact in an action for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided by sections 270, 271." Here is a clear authority to dispense with a jury trial and substitute a trial by the court or referee under the circumstances mentioned, and the only question in this case is whether the reference was ordered as provided in section 270; for it is not pretended that it was ordered under section 271; section 270 as we have already seen provides for a reference to try any or all of the issues in the action upon the written consent of the parties. Was this reference made upon such written consent? There was no stipulation or consent subscribed by the parties authorizing it. Was such consent so evidenced indispensable? Undoubtedly the attorneys of the parties might act for them in this particular as in others in conducting the action and defense, and I do not understand the plaintiff's counsel as insisting upon so strict a construction of the terms, "written consent of the parties" as would preclude such action of their attorneys.

But does the section require the written consent to be subscribed by the parties or their attorney's? There is nothing in its language making such signature indispensable? It must be in writing, but that does not necessarily imply that it is to be either signed or subscribed.

In this case, the order of reference which was drawn by the defendant's attorney and submitted to and approved by the plaintiff's attorney, in terms expresses the consent of the attorneys of both parties to the reference, as follows—"upon the consent of the attorneys for each of the above parties given in open court, it is ordered that this action be and the same is hereby referred &c." There is no doubt of the fact that the consent of the attorneys to the order of reference entered was given in open court, and that such consent was written out in the order thus drawn by the defendant's attorney and copied by the clerk into the minutes of the court. I think this was a sufficient written consent of the parties to authorize the reference and make it valid. The requirement of the note or memorandum in writing of a contract signed by the parties to be charged by such contract contained in the former statute of frauds, was held to be satisfied if such memorandum stating the names of the parties to the contract and its terms, was written by a broker in his book in the presence of the party sought to be charged although such party did not subscribe or otherwise sign the memorandum, (12 *J. R.*, 102, 14 *id.* 484), and so here the consent of both parties to a reference put in writing first by the defendant's attorney and assented to by the plaintiff's attorney and then entered by the clerk in his minutes by the consent of both parties in open court, is a full compliance with the requirement of "written consent of parties" contained in § 270. I do not see how this could be denied if there were no direct authority for so holding. But the question has been directly decided in this court. That this is an action of divorce does not change the rule of construction as applicable to this statute. The phrase

"consent in writing," has the same force in the statute whether used in reference to proceedings in an action for divorce or any other action. In regard to all the actions referable under § 270 the question, 'what is the consent in writing required, is the same, and a judicial construction of the meaning of the terms in that section, given in one action, is applicable to all actions referable thereby.— In the case of *Leaycroft* agt. *Fowler* (7 *How.*, 259) not an action for divorce, it was decided that the written consent to refer, required by this section, may be written by the parties or by their attorneys or by the clerk of the court entering their consent in the minutes of the court, or the referees entering it in their minutes.

In the *People* agt. *McGinnis*, (1 *Parker Cr. R.*, 387,) the question came up at general term in the 7th district, whether an action of divorce is referable, and if referable, whether a valid reference can be made in such action without the parties or their attorneys subscribing a written consent thereto, and it was held that sections 259 and 270, authorize a reference in such actions, and that it is not necessary that the parties or their attorneys subscribe a written consent thereto, but that it is sufficient if an order of reference is entered with this assent in open court such entry being their "written consent to the reference." This does not conflict with *Diddel* agt. *Diddel*, (3 *Abbott's R.*, 167), that merely holds a written consent necessary, and as no evidence of such consent was presented with the report of the referee on motion for judgment, the court held the reference irregular and refused judgment on the report, the mere order of reference is not of course a written consent, but when in fact assented to as drawn by both parties and entered by consent of both parties in open court as in this case, I have no doubt of its sufficiency.

Without discussing the question whether in this action the written consent might or might not be waived by appearing before the referee and participating in the trial, it

is sufficient to say that the written consent required by § 270, was had, and that the reference was valid and no ground appears for setting the order aside.

The motion of the plaintiff also asks for a modification of the order of reference so as to make it an order that the referee take the evidence and report it to the court with his opinion thereon.

Granting to the plaintiff all that is claimed in respect to the understanding of his attorneys and counsel, that the reference could be allowed only to the extent to which they now seek to restrict it; there are two answers to this part of the motion which it seems to me require its denial.

In the first place the practice established by the Code does not allow of a reference to take the evidence and report it to the court with the opinion of the referee merely, nor of any reference except for a trial of the issue in a case where an issue has been joined in the action. It is a part of the system inaugurated by the present constitution, (art 6 sec. 10) that the former practice in equity suits by which evidence was taken before an examiner and not in the presence of the tribunal deciding the issues should be done away, and it is only in cases where no issue has been joined or where some interlocutory question is involved, that a reference to take and report evidence is now allowable. (Code § 271, 246).

In the second place the plaintiff has already had all the advantage which he could have had if the proceeding had been precisely as he, by this branch of his motion seeks to make it. Both parties have introduced all the evidence which they desired before the referee and it was taken down by him. This evidence has been reported to the court with the referee's opinion thereon, and upon this report the court has pronounced judgment in favor of the defendant. I can see no advantage which the plaintiff would have had, if the referee had been proceeding under such an order as the plaintiff's attorney considered this in effect to be, which he

has not already had in the case. This results from the practice which in actions of this kind makes the findings of the referee equivalent merely to the verdict of a jury, upon the issues submitted to them and requires the judgment of the court notwithstanding such findings and verdict upon the whole case. The motion to modify the order of reference, manifestly cannot be, and ought not to be granted. As to the residue of the plaintiff's motion, which is to set aside the report of the referee on the ground that it does not determine all or any of the issues made by the pleadings. This question was before the court upon the plaintiff's cross motion made at the Madison special term, and cannot here be reviewed or considered. If the plaintiff has suffered from any errors of the referee or the court I see no way of correcting such errors but by an appeal to the general term.

The plaintiff's motion must be denied with $10 costs of this motion to be paid by him to the defendant.

SUPREME COURT.

CAROLINE A. DAVIES agt. THOMAS DAVIES.

A limited divorce may be granted under the Revised Statutes, to a married woman for cruel and inhuman treatment by the husband; and also for such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to live or cohabit with him.

It is the duty of the wife, if consistent with her safety, to live with her husband, and bear with his infirmities and ill temper—husband and wife should not be separated lightly or without good cause. But if his conduct be unbearable, and the wife be in reasonable apprehension of personal violence and discomfort, and the conduct of the husband be inconsistent with her safety, she may leave him, and this court will grant the releif demanded.

Where the wife, after the ill treatment of the husband towards her, continues to live and cohabit with him as before, the former ill treatment is condoned, and a limited divorce will not be granted therefor, but, if after such condonation, the ill treatment is continued, though of less degree, the original cause of action is revived, and will be deemed in life for the purposes of decreeing separation upon the whole case as presented. Her case, under such circumstances, rests upon a review of all his conduct towards her during their married life.

The question in these cases is, had the wife reasonable ground to apprehend personal injury? Was she exposed to physical injury from continued cohabitation? And in this connection, words of menace accompanied by a probability of bodily violence will be sufficient.

In cases of this character, though the wife be not entirely faultless, and though her language and conduct may have been in many particulars irritating and provoking, still, all due allowance is to be given to human frailty. The conduct of the husband and his treatment, as provocative of her conduct and behavior; the position and standing in life, of the parties, their degree of refinement, and all the circumstances of the case as presented, are to be examined and considered by the court in granting or refusing the relief prayed for in the complaint.

Seventh District: Special Term, April, 1869.

ACTION for limited divorce. This action was brought by Caroline A. Davies against Thomas Davies. The parties were married in February, 1863. Previous to the marriage, the plaintiff had been the defendant's housekeeper—There were no children born of the marriage—No difficulty occured between the parties till about January, 1866. About that time, a young woman, known to both parties, came to their house as a visitor, and soon after her arrival, the plaintiff saw

or suspected a too close intimacy between this young woman and her husband, the defendant. This gave rise to much difficulty,and the plaintiff repeatedly remonstrated with the defendant on the subject, and at times made somewhat harsh accusations of adultery between them. Several acts of intimacy, not amounting to proof of adultery, were sworn to by the plaintiff on the hearing before the referee, who took the testimony in the case. From this time, there was estrangements and repeated quarrels between the plaintiff and defendant on the subject of this young woman, the plaintiff insisting that she should leave the house, the defendant insisting upon her staying to conclude her visit. During these altercations, violent and unseemly language was frequently used by both parties, the defendant using profane and in some instances indecent language towards his wife, calling her unchaste and reproaching her on account, as he termed it, of her homeliness and unattractive appearance. She retorted, accusing him of illicit intercourse with the young woman in question, of attempting to poison her, the plaintiff, and at times when excited by his actions and language, used improper language, calculated to irritate and provoke. The defendant several times, threatened her life, and personal violence toward her. This state of affairs continued until July, 1866, when it culminated in a serious quarrel between the plaintiff and defendant, during which, the defendant choked the plaintiff, committed severe personal violence upon her, and struck her a blow with his fist upon the left temple, severing the temporal artery, and endangering the plaintiff's life.

The plaintiff after this continued to live and cohabit with the defendant, but their relations were by no means pleasant or agreeable. For a few days, at intervals, they would live quiet and peaceably, when the smouldering fires would again burst forth, and violent and abusive criminations and recriminations were the result. He at times would continue his threats of personal violence and apply to the plaintiff op-

probrious names and epithets, and she would repeat her charges of adultery and reply to the defendant in harsh terms and language. So they lived together down to October, 1866, when, one Sunday morning they had another quarrel, during which the defendant, raised his boot and threatened the plaintiff that "if she did not go out of the room pretty lively, he'd knock it over her head." Defendant also conducted himself at this time in a very violent and abusive manner toward the plaintiff, telling her she should go to states prison, and shaking the coffee pot in her face, using at the same time profane and abusive language towards the plaintiff, saying "he wanted nothing more to do with her, that if it was not Sunday, he would throw her out of doors, that he would throw or boot her friends out of the house if they came to see her," and conducted himself with great violence and impropriety.

On the Tuesday following, the plaintiff left the defendant's house, and went to her brother's to reside. She testifies, "given up all hope that there was any safety or peace of mind any further."

This action was commenced December 28, 1867.

JOHN C. CHUMASERO & C. C. DAVISON, *for plaintiff.*
J. H. MARTINDALE, *for defendant.*

By the court, E. DARWIN SMITH, J. It is perfectly evident I think, from the proofs in this action, that the parties cannot live peaceably together and perform their proper conjugal duties towards each other. The spirit and temper of both of them forbid it. The defendant had confessedly lost all attachment and respect for his wife, and clearly desired to be rid of her, before she left him. As they must therefore live apart hereafter, the question presented to the court is, whether such separation can and ought to be legalized, so as to permit them to live thus apart, without further strife and in apparent decency and quiet. It is the duty of the

wife to live with her husband and put up with his ill nature and petulance, and bear with his infirmities, if she can do so with safety to her person and without great personal apprehension and discomfort. Husband and wife should not be lightly separated or without good cause.

Under our statute, a limited divorce or separation from bed and board may be granted to a married woman for cruel and inhuman treatment by the husband, and also for such conduct on the part of the husband toward his wife, as may render it unsafe and improper for her to cohabit with him, (2 *Revised Statutes*, *chap.* 8, *part* 2, *article* 4, *p.* 186).

I think there can be no doubt that the defendant's treatment of his wife on the 23d day of July, 1866, as they both describe the scene and transaction, was such cruel and inhuman treatment as would warrant a divorce according to all the cases. (*Vid.* 10, *Paige* 22; *Whispell* agt. *Whispell*, 4 *Barb.*, 220; 17 *Abb.*, 21). But the plaintiff continued to cohabit with the defendant afterwards, until about the last of October, 1867, when she left his house—a period of about fifteen months—this continued cohabitation for so long a period after the ill treatment of July, 1866, implies a forgiveness of such treatment, and a purpose to retain her conjugal relations with the defendant, and to trust to his good treatment for the future. After such a lapse of time and such forgiveness, the court would not grant a divorce for such ill treatment, if in the interval, the defendant had treated his wife kindly and given her no further cause of complaint. The wife must, under such circumstances, be deemed to have elected to abide with her husband and trust to his assurances of amendment and future good treatment. But if she has occasion to complain of his treatment afterwards, she is not debarred the right to refer to such ill treatment, and bring the same forward as a part of her ground for the belief that she cannot safely continue to cohabit with him. Her case rests upon a review, under such circumstances, of all his conduct to-

wards her during their married life, and not upon any single act.

The question at all times in this class of cases, is, had the plaintiff reasonable ground of apprehension in regard to her personal safety at the time she left her husband? Had she any ground to believe that she was exposed to any physical injury by a continuance of her cohabitation with her husband? (1 *Bishop on Marriage and Divorce*, § 715, 16, 17). There must be in all cases ill treatment and personal injury, or a reasonable apprehension of personal injury, (*Whispell* agt. *Whispell supra* 219). Words of menace, accompanied by a probability of bodily violence will be sufficient, (*id.*)

The testimony of the wife in this case, if believed, I think fully establishes the fact, that the plaintiff was more or less exposed to personal violence during her cohabitation with the defendant from the time of her recovery after the injury inflicted upon her by the defendant in July, 1866, until she finally left him. She testified, that he made frequent threats of personal violence. He threatened at one time, to pitch her out of the sleigh, if she got in, and give her a horse-whipping.

On Sunday evening, before she left him, after some altercation between them, she says "he raised his boot, and said: "if I did not go out of the room pretty lively, he would knock it over my head." On the same morning at breakfast, after some conversation about the "young woman" Helen, who I should think had been the chief cause of the jealousy, suspicion and trouble between these parties, she says, "he jumped up, and took the coffee pot and commenced shaking that in my face." She also testifies, that, on this occasion, he also said, "he didn't want to have anything more to do with me." He also said, "if it was not Sunday morning, he would throw me out of doors."

These instances of assault and menaces, and threats of personal violence, tend to prove that he was capable of using such violence upon her person, and gave, I think, ground

of reasonable apprehension on her part, that she might suffer personal injury if she continued to cohabit with him.

It is true that Mr. Davies denies much of this testimony, but I am inclined to think that I should rather believe the plaintiff than the defendant when their testimony comes in conflict, and for the reason that her statement is affirmative, and his, simply denial, and also that he admits much that tends to coroborate her statements. He admits the personal violence used in July, 1866, and the use of frequent harsh language towards her, and the threat to throw her out of the sleigh, and also for the reason, that the testimony upon the whole, shows that he possessed a violent temper and had clearly lost all affection for his wife and wished to be rid of her, and was just in that frame of mind when she left him, to do just what she says, he threatened to do. This view is strongly confirmed by the letter produced, which he wrote soon after she left him, and when his passions were not excited by any immediate provocation upon her part. In that letter to her brother, he writes, that he proposes to commence a suit in the courts for a divorce; and says also: "I have made up my mind, the foolish, simple, but black-hearted woman will never live with me again." This letter is dated November 11, 1867, and must have been written ten days or two weeks probably, after the plaintiff left the defendant's house.

It is quite apparent that the plaintiff did not behave well herself, that her language and conduct were in many particulars unbecoming and provoking. Perhaps, however, it was about such language as might be expected from a woman in her situation and grade of life, and of her state of refinement, rendered jealous, and aggravated by the defendant's treatment of her in keeping another and a handsomer woman in the family, under the circumstances detailed in the evidence, and a woman too, whom he seemed to admire and treat with more kindness and attention than his wife. Many of the plaintiff's fears and suspicions were undoubtedly

groundless, but they were probably honestly entertained and were caused by him, and were rather fostered than allayed by his conduct towards Miss Button, in the presence of his wife.

Upon the whole case, and a review of his whole conduct towards the plaintiff during the period of their whole cohabitation as husband and wife, I think I must find that his treatment of her was cruel and inhuman, and that she had when she left him, reasonable ground of apprehension of personal injury in case she continued to cohabit with him, and that her conduct towards him was not sufficiently culpable to debar her of her right to a divorce from bed and board, and a suitable provision for her support. I must therefore so decree, and direct a reference to some member of the bar to ascertain what would be, under the circumstances, a suitable provision to be made by him for her support and alimony.

NEW YORK COMMON PLEAS.

OWEN MARRY agt. FREDRICK P. JAMES & EDWARD D. JAMES.

A *landlord* is not entitled to an *injunction* to restrain *summary proceedings* instituted against his tenants, by another person claiming to be the owner of the lease of the same premises, where the landlord is not made a party to such summary proceedings.

And it does not make the case any stronger for the landlord that he requires the testimony of the city judge, before whom the summary proceedings are pending, as a witness; where the principal object of such testimony appears to be to contradict or shake the credibility of a party prosecuting the summary proceedings by the production of certain affidavits of such party, filed with the city judge in a former proceeding.

The *City Judge* of New York has equal jurisdiction with the Recorder of summary proceedings to recover the possession of land.

General Term, February, 1869.

The facts are sufficiently stated in the opinion.

E. D. JAMES, *appellant in person.*

F. B. H. BRYAN, *for respondent.*

By the court, BARRETT, J. It is difficult upon the papers submitted, to ascertain the precise point presented by this appeal, and our labors would have been greatly aided and doubtless abbreviated by an oral argument. The difficulty to which I refer will be best illustrated by a brief reference to the salient facts and to the present posture of the case itself. The plaintiff avers that he is the owner of a valuable lease of the premises No. 111 West twenty-ninth street, in this city, and that certain persons, whose names are unimportant for the purposes of this dicussion, occupy the premises as his tenants. The general title to the premises, as well as the manner in which the plaintiff acquired the lease and became landlord of the persons in possession is also set out, but it will not be necessary to refer to it. The charge

in brief is, that the defendants, confederating together to obtain possession of the premises, have fraudulently concocted an apparent, but really sham title, which now vests in the defendant, Frederick P. James. The various links in the formation of this alleged fraudulent chain of title are set forth, and the plaintiff then avers that, as a part of the scheme, the defendant, E. D. James, acting as the agent of F. P. James, has instituted summary proceedings before the city judge, for the purpose of ejecting the plaintiff's tenants, untruly alleging therein that F. P. James rented the premises to certain persons named Jackson, Denniston, Waugh and Teller, who on their part have sublet to the plaintiff's tenants, "so as," to quote the language of the complaint, "to draw the legal relation by derivation of landlord and tenant between him, the said F. P. James, and the said tenants of him, the said plaintiff." The plaintiff is not made a party to these proceedings, but his tenants have appeared therein, and deny that they rented from James' alleged tenants, or that they know any landlord save the plaintiff. It is further stated that proceedings of a similar character had been previously instituted by E. D. James before the city judge, wherein his preliminary affidavits were contradictory, and that the city judge is a necessary witness for the plaintiff's tenants in the proceeding now sought to be enjoined, for the purpose of producing his records and proving these affidavits; and it is charged that the proceedings in question were instituted before the city judge for the inequitable purpose of depriving the plaintiff's tenants of the benefit of that officer's testimony. Upon substantially these averments the plaintiff prays that the summary proceedings in question may be restrained, and that the defendants may be enjoined from instituting any proceedings tending to disturb the possession of the plaintiff and his tenants, other than a regular action of ejectment.

It is evident that judge BRADY, who granted the injunction, did not consider the plaintiff entitled to such sweeping re-

lief, as his order expressly reserved to the defendants the right to institute summary proceedings before the justice of the district court, within whose jurisdiction the premises were situated. Why this permission was not extended so as to include the other officers—the mayor, recorder and justices of the marine court—upon whom jurisdiction in these proceedings is conferred, does not appear, but the fact that such proceedings were permitted at all, shows that the injunction was aimed solely at the particular proceeding then pending, and that the facts were deemed insufficient to warrant the general injunction prayed for. In that opinion I entirely concur, for reasons to which I will presently avert; but I go further, and, after careful consideration, I think the facts were insufficient to support even the limited injunction granted.

In the aspect of the case upon which this particular proceeding and that alone was restrained, the equity of the complaint consists simply in the averments respecting the testimony of the city judge. Now, how is the plaintiff prejudiced by the inability of his tenants to procure that testimony? He is neither a party to the proceedings, nor in any legal sense privy to them. Neither his title nor James' can be tried therein. If the relation of landlord and tenant really exists by agreement between himself and these tenants, it cannot be disturbed by a proceeding in which the only issues are whether that same relation exists by agreement between other and distinct persons, and whether these tenants in occupation have (illegally, if, as the plaintiff states, they are really his tenants) attorned to any such other persons. These tenants can only be disturbed by James in case they have, in violation of their duty to the plaintiff, assumed the position, by express agreement, and not by mere operation of law, of subtenants of James' alleged tenants. The proceeding being based, therefore, upon the existence of an agreement which, if entered into, was a practical denial of the plaintiff's title, and upon alleged

facts, with which neither the plaintiff nor his assigns are in any wise connected, this action cannot be sustained on the ground of the landlord's duty to protect his tenants in the quiet enjoyment of the demised premises. The plaintiff, therefore, really has no interest in the summary proceedings. They cannot affect the relations subsisting between the tenants and himself, and should they even result favorably to James, and thus enable him to acquire actual possession—a most unlikely contingency upon the facts before us—still, as against the plaintiff, he would, if devoid of title, be as much a mere trespasser as though, without any proceeding, the premises had been collusively abandoned to him by the plaintiff's tenants. It is for the tenants therefore, (for they alone are interested in the proceedings), to complain if unjustly deprived of testimony. The result, however, would have been the same if the action had been instituted by the tenants.

A very strong case should, in my judgment, be presented to justify a court of equity in restraining, upon such grounds, the exercise of legitimate functions. Otherwise, any judge may be ousted of his lawful jurisdiction, by a loose affidavit, claiming generally, upon the advice of counsel, that he is a necessary and material witness for one side or the other. The utmost that can be gleaned from the plaintiff's complaint and affidavits is, that the city judge may, by producing the records of the previous proceedings, shake the credibility of E. D. James. Surely this does not make the city judge, "a necessary and material witness for the plaintiff's tenants, without the benefit of whose testimony they cannot safely proceed to trial." Ought we, from that slight circumstance, prevent the exercise of a lawful jurisdiction? We are not even assured that E. D. James will be a witness in those proceedings, nor that his testimony is likely to affect the result, nor that the plaintiff has ineffectually requested, either the judge to have these previous affidavits before him at the trial, or his adversary to admit

them. There is nothing but the bald fact that the judge has in his posession certain records, in which are embodied affidavits made by E. D. James, conflicting in respect to the alleged term of hiring with each other and with that upon which these last proceedings are founded. It appears also by the plaintiff's own papers that the tenants have it in their power, not only to contradict, but actually to impeach the witness in question; and thus the testimony upon the alleged deprivation of which the equity of the complaint rests, will probably be merely cumulative. The interference claimed should be most sparingly exercised, and only upon facts, the extreme opposite in strength and importance of the exceedingly slight averments here presented. It should, in fact, be made to appear, clearly and unmistakably, that the judicial testimony is not of itself privileged, and that its absence would involve a complete denial of justice.'

This disposes of what I understand, from the nature of the injunction granted, to be the real question argued at special term, but as the motion to dissolve may possibly have been denied upon the ground that the plaintiff was entitled to a general restraint of any summary proceedings whatever, it becomes necessary to consider that question without reference to the permission to proceed before the district court judge, (which, if that view be correct, should not have been embodied in the original order), and apart from the special facts upon which the particular proceedings before the city judge were sought to be restrained. I have already expressed my concurrence in the opinion upon that head which judge BRADY must have entertained when the permission referred to was engrafted upon the original order; and my reasons therefor, so far as they are based upon the plaintiff's want of interest in or privity with the proceedings, have been sufficiently expressed. It may be added that the only cases where, in view of the stringent provisions of the statute, (2 *R. S. Edmonds' ed'n., p.* 533, § 47), these proceedings should be enjoined, are cases of

fraud, surprise or undue advantage, (*Smith* agt. *Moffat*, 1 *Barb.*, 65; *Wordsworth* agt. *Lyon*, 5 *How., Pr. R.*, 463; *Hyatt* agt. *Burr*, 8 *How. Pr. R.*, 168; *Duigan* agt. *Hogan*, 1 *Bosw.*, 465, *where the subject was exhaustively considered*; *Bokee* agt. *Hamersley*, 16 *How. Pr. R.*, 461; *Marks* agt. *Wilson*, 11 *Abb. R.*, 87; *Seaback* agt. *McDonald*, *id.*, 95; *Aaron* agt. *Baum*, 4 *Abb. N. S.*, 65); not these acts generally or collaterally, but fraud under cover of these proceedings, or surprise or undue advantage in their conduct; such, for instance, as the service of the summons so short a time before the hour fixed for its return as to render it physically impossible for the tenant to reach the court-room before the hearing. (*Griffin* agt. *Brown*, 28 *How. Pr. R.*, 4; *Cure* agt. *Crawford*, 5 *How. Pr. R.*, 293, which was correctly decided upon its particular facts, although the reasoning, like that of *Capet* agt. *Parker*, 1 *Code R. N. S.*, 90, has long since been overruled; *Forrester* agt. *Wilson*, 1 *Duer*, 624, the facts of which case are more fully detailed in *Duigan* agt. *Hogan*, above cited.) Here there is neither fraud nor surprise, nor undue advantage in the proceedings themselves. The tenants have had full notice, have interposed their defense, and adjourned the proceedings for a regular and orderly trial. The fraud complained of, consists in the falsity of the affidavit upon which the proceedings are based; but that is the very matter at issue and to be there tried. With the object and intent of the defendants in seeking that trial we have nothing to do. The respondent raises the additional point that the city judge has no jurisdiction in summary proceedings.

That question is not to be tested by injunction, but by prohibition, if before judgment, or thereafter by action, if damage has been sustained. I have no doubt, however, that the jurisdiction exists. The decision of the court of appeals in *Nash* agt. *The People*, 33 *How. Pr. R.* 384, does not affect the question, as it was merely held that the recorder, for the reasons there given, had no authority to issue

the writ of *habeas corpus*, while that officer is expressly named in the statute with respect to summary proceedings. The city judge, then, being vested by law with the judicial powers and functions of the recorder, jurisdiction being expressly conferred upon the latter officer by the statute, and the character of the proceedings being unquestionably judicial, the point is fully disposed of. The order should be reversed and the injunction dissolved.

SUPREME COURT.

ANSON W. JOHNSON agt. ELISHA CROFOOT, Sheriff of Lewis County.

The lease of a dairy farm with a certain number of cows and other personal property for two years at a certain rent per annum, payable at a certain time made and executed by landlords to a tenant, which contained a clause as follows: "The party of the first part (landlords) are to have full title with the privilege of taking possession at any and at all times, of any and all products of the farm in payment of the balance due on the rent at the time of its payment."

Held, that this clause operated in favor of the landlords and their assignee as a mere security for money, and was necessarily in the nature of a *chattel mortgage;* and the tenant being in possession of the farm and its products by an absolute lease, with the above exception, and the lease never having been filed as a chattel mortgage, the products of the farm were liable to execution and sale for the tenant's debts; no default having been made in the payment of rent. *

Fifth District, General Term, October, 1868.

Before BACON, MORGAN, MULLIN *and* FOSTER, *Justices.*

MOTION for a new trial on the part of the plaintiff upon a verdict for the defendant under the direction of the Judge.

On the 5th day of November, 1866, Miller & Rumble leased to one Barton E. Tifft a dairy farm in the town of Pinckney, Lewis County, with 40 cows and some other personal property, for the term of two years from December 1, 1866, at the yearly rent of $750. The lease provided that the milk of the dairy should be taken to a neighboring cheese factory to be manufactured into cheese, and when sold five-eighths of the proceeds to be paid to the landlord upon the rent, and at the last sale of cheese the tenant was to pay the balance of rent, if any remained due. The lease also contained the following clause:

"The party of the first part are to have full title with the privilege of taking at any and all times, of any and all products of the farm in payment of the balance due on the

*NOTE.—See *Van Heozer* agt. *Cory*, 34 *Barb.*, 9: and *Andrew* agt. *Newcomb*, 32 *N. Y.*, 417.

rent at the last factory sale, at which such milk is drawn and left unpaid by the party of the second part."

The lease also provided that the tenant "should feed out the hay and straw in a careful and farmerlike manner, to cut and get in good order all the hay" and in case of deficiency of hay or straw on the farm to feed the stock, then the landlord was to furnish such deficiency.

The landlord also reserved in the lease the right to re-enter and take possession of the farm at any time between the first day of December and the first day of March, in each year, in case he sold the farm during the term of the lease. Tifft, the tenant, went into the possession of the farm and personal property shortly after the execution of the lease. On the 8th day of July, 1867, Miller and Rumble, the lessors, sold the farm and assigned their interest in the lease and personal property to the plaintiff in this action. The plaintiff never had possession of the farm or personal property, but Tifft continued in possession as tenant under the lease from Rumble and Miller. On the 9th of August, 1867, Ballard and Hanchett of Watertown, recovered a judgment in the supreme court, against Tifft the tenant, for $630 upon which an execution was issued to the defendant as sheriff of Lewis county, August 10, 1867, by virtue of which he levied upon, and sold about sixty tons of hay on the farm, and raised thereon by Tifft, and being then in his actual possession, he being still in possession of the farm.

The plaintiff thereupon brought this action against the sheriff for a wrongful taking and conversion of the hay, claiming title to it under the clause in the lease, and also claiming, that the title to the hay never passed to, or vested in the tenant, but was to remain on the farm for the purpose of feeding the stock.

The cause was tried at the Lewis circuit in October, 1867, before Justice MULLIN, and a jury and the foregoing facts were proved and it was conceded by the plaintiff that the lease had never been filed as a chattel mortgage.

At the close of the evidence the judge directed a verdict for the defendant, with leave to the plaintiff to move to set it aside and for a new trial at the general term.

A. J. MERENESS, *for plaintiff.*
D. O'BRIEN, *for defendant.*

By the court, FOSTER, J. The plaintiff as between him and Tifft, had only the interest in the hay in question of a chattel mortgagee; for such in fact was the clause in the lease from Miller and Rumble to Tifft, by which it was stipulated that Miller and Rumble were "to have full title, with the privilege of taking possession at any and all times, of any and all products of the farm in payment of the balance due on the rent at the last factory sale."

The lease to Tifft of the premises was absolute and with the exceptions of the proceeds of three-fifths of the milk to be sold to the cheese factory, he was the owner, and was entitled to the possession of it and the clause above set forth was a mere security for money; and necessarily in the nature of a mortgage. But it is argued by the counsel for the plaintiff that it was not a mortgage, and that the title to such hay as should grow on the place did not pass to Tifft because he stipulated in the lease that he would cut and get in in good order all the hay, and that he would feed out the hay and straw in a saving manner, and because it was further stipulated that he was "to have the privilege of keeping a span of horses all the time, and a third horse during haying" which, it is claimed, is inconsistent with the idea that the title to the hay was to be in him.

The answer to the argument is perfectly manifest. By the terms of the lease, Miller and Rumble bound themselves to supply all such hay as was necessary to winter the stock after the hay and straw raised on the place was exhausted; and therefore, they were interested in limiting the amount of stock to be kept and in providing that all the hay and

straw should be saved and carefully used, as though the title to it was in them.

The covenant on the part of Tifft to save all the hay and straw, and to carefully feed it to the stock, and to keep but two horses except during haying time, was only an agreement binding on him at law, and if he chose to keep more horses, or to sell or improvidently use the hay, it did not authorize Miller and Rumble to interfere with it, either by taking possession of it, (for they were entitled to possession *only* as security for the unpaid rent) or to restrain such use of it by injunction.

If so improperly used Miller and Rumble had but two remedies. They could refuse to supply the deficiency thus caused or sue at law upon the broken covenants.

As the only title that Miller and Rumble had to the hay was that of chattel mortgagees, that was the title they transferred to the plaintiff by the assignment to him of the counter-part of the lease. It was never filed as required by the statute to make it valid as against the creditors of Tifft. Tifft was in the actual possession when the levy and sale took place, and therefore, the plaintiff cannot recover. This question strikes at the foundation of the plaintiff's claim. There is no claim that the lease had ever been filed; and even if there were errors committed on the trial, a new trial would be useless, and I therefore see no necessity for examining the other questions raised in the case.

A new trial should be denied and judgment entered upon the verdict for the defendant.

Judgment accordingly.

COURT OF APPEALS.

GEORGE A. OSGOOD and CYRUS CURTISS, receivers of the COLUMBIAN INSURANCE COMPANY, respondents agt. WILLIAM LAYTIN and others, appellants.

If an *insurance company, being insolvent*, distributes its *capital* among its stockholders, thus placing it beyond the reach of its creditors, such act is a *fraud* upon the creditors, and falls directly within the provision of the statute (*Laws of* 1858, *p.* 506, § 1) which provides: That the receiver of an insolvent corporation may, for the benefit of creditors, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor.

And in an action by the receiver to recover, by virtue of said statute, from the stockholders, it is not necessary that the complaint should aver an intent, in making the distribution, to defraud the creditors.

The receiver is a trustee for all the creditors, and the appropriate party to prosecute in their behalf; and all the stockholders who are liable may and should be included as defendants in the action.

If any *creditors* have previously commenced actions individually, against such stockholders to recover such fraudulent distributions, they may be included as defendants together with the stockholders, in an action brought by the receiver, and restrained by injunction from the further prosecution of such action.

September Term, 1867.

THE Columbian insurance company was organized as an insurance company by virtue of the general act authorizing the organization of such companies.

The company was dissolved by the judgment of the supreme court, in February, 1866, and the plaintiffs appointed receivers, who duly qualified and gave the requisite security. In July, 1866, the company, being insolvent, paid a dividend of three and one-half per cent, upon its stock to the defendants, who were stockholders of the company; some of the defendants who were creditors of the company, commenced actions, individually, against several of the stockholders separately, for the purpose of recovering from them the amount of the dividend received by them respectively. Whereupon the plaintiffs commenced this action against all

the stockholders of the company who had received dividends, and also against the creditors of the company who had commenced actions against the stockholders, demanding judgment against the stockholders, severally, for the amount of the dividends respectively received, and a judgment against the creditors, perpetually restraining them against the prosecution of suits against the creditors of the company for the collection of the dividends received.

The defendants, or a portion of them, demurred to the complaint: the stockholders upon the ground that the facts stated, constituted no cause of action; the creditors upon the same ground, and also that plaintiffs had not legal capacity to sue, that there was a defect of parties defendant, and that several causes of action were improperly united.

Judgment was given for the plaintiffs upon the demurrers at special term, which was affirmed on appeal at the general term of the supreme court, from which the defendants appealed to this court.

ELBRIDGE T. GERRY & C. C. LANGDELL, *for appellants.*
D. D. FIELD, *for respondents.*

By the court, GROVER, J. The point presented by the stockholders who have demurred is, that the plaintiffs cannot recover from them the sums received as dividends, for the reason that the complaint shows that the same was paid out of capital and not out of profits, and is not therefore a dividend within the meaning of the law, but a misappropriation of capital, and does not therefore come within the meaning of the statute. I am at a loss to discover how the argument, that money paid by the company to its stockholders, although paid as a dividend, is not such in a legal sense, if sound, can at all benefit these defendants. *Sec.* 1, *p.* 506, *Laws of* 1858, among other things provides: That the receiver of an insolvent corporation may, for the benefit of creditors, treat as void, and resist all acts done, transfers

and agreements made, in fraud of the rights of any creditor. From the facts stated in the complaint, it is manifest that a distribution of the capital of the company, or any part of it, among the stockholders, was a fraud upon the creditors.

It is alleged that the company was at the time insolvent.

It must be presumed that the directors, at the time of declaring the dividend, were cognizant of this fact, as it was the duty of each to examine into the affairs of the company before making a dividend, and when making it to know that it was made from net profits belonging to the company. If the company, being insolvent, distributes its capital among stockholders, thus placing it beyond the reach of its creditors, such act is a fraud upon the creditors, ands falls directly within the provisions of the statute above cited.

It is insisted by the counsel for the stockholders that to authorize the plaintiffs to recover, by virtue of the above statute, from the stockholders, the complaint should aver an intent in making the distribution to defraud the creditors. I do not think this necessary. Ignorance of facts that it was the duty of the managers to know, not to know which was gross negligence, cannot excuse the managers and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors. But I do not think the position sound. Sec. 20 of the act, to provide for the incorporation of insurance companies, as amended in 1857, (4 *Edm. R. S. p.* 210), provides that. "No dividend shall ever be made by any company incorporated under this act, when its capital stock is impaired, or when the making of such dividend will have the effect of impairing its capital stock; and any dividend so made shall subject each of the stockholders receiving the same to an individual liability to the creditors of said company, to the extent of such dividend received by him." This shows that the legislature used the term dividend in its popular sense, that is, a sum of money distributed *pro rata* among the stockholders without reference to the source from which it was taken or

paid. The fact of its being illegal to make a dividend of anything but net profits does not at all tend to show the meaning of the legislature in the use of the word. The design plainly expressed by the language of the section was to prohibit a dividend of the capital among the stockholders, and to preserve the same intact as a fund for the payment of creditors and security of dealers. It follows that the dividend in the present case was illegal, and that the stockholders receiving the same are liable to the creditors for the amount by them respectively received.

The next question is, how is this to be recovered from the stockholders. Their liability is to the creditorsof the company. It is clear that no one creditor of the company can maintain an action against an individual stockholder, for the reason that the liability created by statute is to the creditors generally, and not to individual creditors, thus creating a liability to the creditors jointly. Again, a creditor, if permitted individually to sue the separate stockholders, might institute actions against each, although his demand amounted to far less than the aggregate liability, and he would continue a creditor until he had obtained satisfaction of his debt, and could obtain judgment in all the actions.

Again, in equity, this libility enures to the creditors, in proportson to the amount of their debts respectively. The maxim "that equality among creditors is equity," is applicable to the case. A court of law cannot, in a joint action by all the creditors, work out this equity and do justice between the parties.

This confers jurisdiction in equity, upon the ground that there is no adequate remedy at law. The plaintiffs as receivers are trustees for all the creditors, and the appropriate parties to prosecute in their behalf; thus avoiding the troublesome inquiry as to who are creditors in the proceeding, to collect from the stockholders the several amounts each is liable to pay. All the stockholders who are liable may, and should, be included as defendants in the same

action. There is no difficulty in determining the amount each is to pay upon the trial of the cause, and in case the whole amount of the liability is not required for the payment of the debts of the company, the precise amount each is to pay can be determined in the action. This course of proceeding is also necessary to prevent multiplicity of actions, as there are several hundred of stockholders.

The above views dispose of the case as to the stockholders.

The creditors insist they are not proper parties to the action against the stockholders, and that upon this ground they are entitled to judgment upon the demurrer. Equity having the power to enforce payment from the stockholders, and an action having been instituted in the proper mode for that purpose, which in its result will place the fund in the possession of the court for distribution among the creditors, it is the duty of the court to protect the stockholders from being harassed by other actions instituted to enforce the same liability.

This can only be done by restraining such actions.

To enable the court effectually to do this, those creditors who have instituted such suits, and those who threaten so to do, are proper parties to the action. The judgment appealed from should be affirmed.

N. Y. COMMON PLEAS.

ALEXANDER T. STEWART and others agt. WILLIAM C. POTTER.

An *order of arrest* for fraud in the purchase of goods by representing a bank check drawn by a third person to the order of the defendant given by him in payment therefor, to be good, and that it would be paid on presentation at the bank, cannot be sustained where it appeared that on the day of the purchase and on the subsequent day, the drawer of the check had sufficient funds in the bank for the payment of said check, but that he closed his account with the bank on the day previous to the presentation of the check at the bank in the course of regular bank exchanges—there being no evidence connecting the defendant with the closing of the bank account, and no insolvency of the drawer of the check shown.

Although cotemporaneous acts of fraud of a similar character with the one charged in the action, are undoubtedly material in actions of this kind, yet they must be proved as other facts are, not by hearsay.

General Term, DALY, BRADY *and* BARRETT, *Judges.*

Heard, October, 1868. *Decided, April*, 1869.

THIS was an appeal from an order denying a motion to set aside an order of arrest. The facts are fully stated in the opinion of the court.

IRA D. WARREN, *for appellant.*

H. H. RICE, *for respondent.*

By the court, BARRETT J. The defendant appeals from the denial of his motion to vacate an order of arrest which had been issued against him upon the following facts.

On the 29th of July, 1865, he purchased some goods at the plaintiff's store, and gave in payment a check of one Downing for $330, upon the Central bank of Brooklyn, payable to his own, the defendant's order, and indorsed by him. The purchase amounting to but $63.39 the plaintiffs gave the defendant the difference in cash and delivered the goods upon his representation that the check was good and would be paid upon presentation. In the regular course of the

plaintiffs business the check reached the Central bank of Brooklyn on the first of August, 1865, when payment was refused, Downing having closed his account upon the day previous. It appears that Downing made a deposit of $3.363 on the 29th, and of $1.350 on the 30th of July, and that the check was perfectly good at the time of the representation and down to the hour when the account was closed.

There is no evidence connecting the defendant in any way with the summary closing of the account, and for ought that appears, he has himself been victimized to the extent of at least of the $130, which he has since returned to the plaintiffs. It is quite clear that if the check had been sent direct to the Central bank, either upon the day of its receipt or upon the following day, there would have been no loss. At all events, the defendants statement was literally true. The check was then good and would have been paid upon presentation within what was certainly a reasonable length of time. But it cannot from that single fact be said that the defendant was guilty of fraud in contracting the debt. A party is no doubt responsible for his unqualified assertions with respect of existing facts, and that whether he speak from actual knowledge or not (*Barret* agt. *Judson*, 21 *N. Y. R.*, 238; *Crary* agt. *Ward*, 36 *Barb.*, 377), but a statement that a check of another person would be paid upon presentation was necessarily a mere expression of opinion and beleif, and must have been received as such. Certainly, no charge of fraud can be predicated thereon, in the absence of any evidence throwing discredit upon the faith thus affirmed.

The gist of the representation and that upon which alone reliance could have been placed, was the defendants knowledge of the existence at the time, of sufficient funds on deposit in the bank to meet the check, and this as we have seen, was true. But even if the statement that the check was good is to be taken in a broader sense and paraphrased into an affirmation of the responsibility of the drawer, it does not appear that the plaintiffs have tested its accuracy

by legal proceedings or otherwise, and there is no allegation of Downing's past or present insolvency.

Now is the case strenghtened by Mr. Rice's affidavit with respect to previous arrests.

Contemporaneous acts of fraud of a similar character are undoubtedly material in actions of this kind (*Hall* agt. *Taylor*, 18 *N. Y.*, 588; *Cary* agt. *Hotaling*, 1 *Hill*, 311; *Meyer* agt. *Goedel*, 31 *How. Pr. R.*, 456; *Amsden* agt. *Manchester*, 40 *Barb.*, 558), but they must be proved as other facts, and not by hearsay. Mr. Rice's statement amounts to but this: that many other parties who are not produced, have from time to time charged the defendant with fraud, and procured his arrest. This is not evidence and *non constat* the charges were just as unsubstantial as we have found the present.

We are therefore of opinion that upon the plaintiffs own showing they must be non-suited unless further facts be adduced upon the trial, and, for that reason, although the action itself is for the alleged fraud; the arrest flowing therefrom cannot be upheld (*The Royal Ins. Co.* agt. *Noble*, 5 *Abb. R. N. S., and cases there cited.)*

The order should be reversed with $10 costs, and the order of arrest vacated upon the defendants stipulating not to sue.

BUFFALO SUPERIOR COURT.

GEORGE T. ELLIOTT agt. ANDREW J. BUCKLAND, *et al.*

In an action of *claim and delivery of personal property*, where judgment is rendered for the plaintiff, that he recover the possession of said property or a certain sum being the value thereof, in case a delivery cannot be had, with costs &c.: On appeal from such judgment to the court of appeals, in order *to stay the proceedings* pending the appeal, the defendant must give an *undertaking* not only under sections 334 and 335, but also under section 336 of the Code.

October General Term, 1868.

DEMURRER to answer.

L. LECLEAR, *for appellants, defendants.*

BASS and GORHAM, *for plaintiff and respondent.*

By the court, MASTEN, J. To recover the possession of certain one hundred and twenty barrels of flour in the possession of one Bidwell, the plaintiff brought in this court against said Bidwell an action denominated in the Code "claim and *delivery* of personal property. (*Code, chap.* 2, *title* 7, *part* 2.)

The said Bidwell to retain the possession of said flour gave to the sheriff, pursuant to section 211 of the Code, an undertaking executed by the defendants in this action for the *delivery* of the said property to the plaintiff if *such delivery be adjudged*, and for the payment to him of such sum of money as might for any cause be recovered against the said Bidwell. The plaintiff recovered judgment against said Bidwell in said action that the plaintiff recover the possession of said flour *or* one thousand six hundred and twenty dollars being the value thereof in case a *delivery* could not be had, together with forty-seven dollars and twenty-five cents damages for the detention of said property and also eighty-nine dollars costs of said action.

The plaintiff caused execution in due form to be issued upon said judgment, which was returned unsatisfied.

The said Bidwell appealed from said judgment to the court of appeals and executed with sureties an undertaking pursuant to sections 334 and 335 of the Code.

The plaintiff thereupon brought this action upon the said undertaking given under section 211 of the Code.

The single question presented by the demurrer is whether the proceedings are stayed during the pendency of the appeal to the court of appeals.

The defendants contend that an undertaking pursuant to sections 334 and 335 stays the proceedings. The plaintiff contends that the undertaking should also have been under 336 to operate as a stay of proceedings.

The plan of the Code is thus declared: "the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."—(*Code, section* 69.)

Writs of error in civil actions are abolished and appeals substituted. (*Section* 323.)

The provisions of chapter 2, entitled "Appeals to the Court of Appeals," (*sec.* 334, &c.) in relation to the security to be given upon an appeal to the court of appeals to make the appeal effectual and to stay proceedings, are taken substantially from the provisions of the Revised Statutes of 1830, prescribing the security to be given on appeals from the *court of chancery* to the court of errors (2 *R. S.* 605). And they are made applicable to all actions whether theretofore known as legal or equitable.

The Codifiers in their note to section 334 say: "this section and those following relating to securities on appeals, are taken substantially from the Revised Statutes, *with such*

modifications however both in language and effect as to make them conformable to our general PLAN (2 *R. S.*, 605, 8.)

The language of the Code is frequently loose and does not show that carefulness and accuracy which so great a change should have secured.

It becomes our duty to apply to legal actions, provisions couched in language more easily understood when applied to equitable actions, but intended to be applicable to both kinds of actions.

Looking then at all of the provisions of the Code, I think it was intended that section 336 should embrace a judgment for the recovery of the possession of personal property in the action of "claim and delivery of personal property."

One of the cases provided for in section 336 is when "the judgment directs *the delivery of personal property.*"

The form of judgment in the action of "claim and delivery of personal property" is prescribed by the Code, (*section* 277.)

If the property has been delivered to the plaintiff, the judgment is "for the possession," if it has not been delivered to him, it is "for the recovery of the possession, *or* the value thereof, in case a *delivery* cannot be had," and "for the damages" (in either case) "for the detention." (*Fitzhugh* agt. *Warren* 9 *N. Y. R.*, 559.)

The Code prescribes the form of executions upon different judgments,—(*Section* 289). The fourth subdivision of that section reads, "If it (execution) be for the delivery of the possession of real or personal property, it shall require the officer to *deliver* the possession of the same to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages or rents and profits recovered by the *same* judgment, out of the personal property of the party against whom it was rendered, *and the value of the property* (personal and not real I suppose), *for which judgment*

was recovered, to be specified therein, if a delivery thereof cannot be had.

The language of *sections* 207, 208, 211 *and* 215 tends to show that the Code deems a judgment like the one under consideration in an action of "claim and delivery of personal property," to be one "directing the delivery of personal property.

The judgment under consideration is "a judgment directing the delivery of personal property," and also "a judgment *directing* the payment of money.

I am of the opinion that the undertaking given on the appeal to the court of appeals, did not stay proceedings, and that the plaintiff is entitled to judgment on his demurrer to the answer.

NEW YORK COMMON PLEAS.

JAMES T. LLOYD agt. WILLIAM WORRELL.

A lease of a *theatre* for a specific term and at a specified rent, which contains a covenant that "at the expiration of such term, there shall be a renewal *for such further time as shall prove mutually profitable*," the lessor to receive a share of the net profits in lieu of rent, is a covenant which cannot be enforced by an action for specific performance—*it is void for uncertainty.*

Special Term, September, 1869.

The defendant rented to the plaintiff the New York theatre for a specific term, and at a specified rent, the lease contained a covenant that at the expiration of such term there should be a renewal for such further time as should prove mutually profitable, the defendant to receive a share of the net profits in lieu of rent. The specific term having expired, the defendant being unwilling to continue the arrangement further, instituted proceedings before the city judge, to dispossess the plaintiff, as a tenant whose term had expired. Thereupon, the plaintiff filed this bill in the nature of—a bill for a specific performance of the covenant to extend the term, and averred that the business was good, and continued to be mutually profitable," proving by affidavit that there was a considerable excess of receipts over expenditures. An injunction was issued, restraining the summary proceedings, which the defendant now moved to dissolve.

SANDFORD and WOODRUFF, *for the motion.*
LUTHER R. MARSH and H. F. AVERILL, *opposed.*

BARRETT, J. The covenant to extend "the time so long as it proves mutually profitable" is indefinite as to the term, and uncertain as to the amount. The term "mutually profitable" does not contemplate the mere excess of receipts

over expenditures, nor even a fair and ordinary profit, but the absolute satisfaction of both parties. The law can lay down no fixed rule upon the subject, for that only is mutually profitable, which each party esteems to be sueh. What is profitable to one, may be unprofitable to another, and there is no happy medium in such matters, for the certain satisfaction of the ordinary mind. But were it possible to define a fair and reasonable profit for to-day, that would be no criterion for to-morrow. Here we are asked to construe the term "mutually profitable" as having reference to a reasonable profit to be ascertained by outside evidence and to specifically enforce the contract, so long as such reasonable profit shall continue during the joint lives of the parties. This would involve our decreeing that to be reasonably profitable, which one of the parties declares to be unprofitable. Apart from the difficulties suggested and from certain legal difficulties which need not be discussed, it would require us to take proof from time to time of the fluctuations in the theatrical market, and to keep up a running adjudication upon the subject of reasonable managerial profits. Before anything approximating to a correct or certain result could be arrived at,the inquiry would necessarily extend over a variety of subjects, such as the effect of the location of the theatre, the character of the pieces and *artistes*, the business transacted at rival establishments and a comparison of counter-attractions, the bare mention of which demonstrates the complete impracticability of the course proposed. I have considered the question in every point of view, and the more I reflect over it, the clearer is my opinion that this covenant is void for uncertainty.

The injunction must therefore be dissolved.

U. S. CIRCUIT COURT.

PETER POILLON agt. JOSEPH SCHMIDT.

The discovery of the principle that *steam* may be made to *pack* in and of itself or to become *self-packing*, is an invention that is the subject of a patent.

It had always been supposed, that ever since steam has been introduced as a motive power, that two contiguous surfaces could be rendered steam-tight, only by actual contact; that consequently, all steam engines had depended for steam-tight moving joints on the contact of smooth surfaces or on elastic packing set steam-tight against its adjacent surface; that in carrying out this idea, great varieties of packing had been devised at great expense.

The fact is now discovered, that steam when introduced into small groves in one or two contiguous surfaces, will itself form a packing without the surfaces being actually in contact.

Southern District of New York, February, 1869.

THIS was an action of *trespass on the case* at common law for the infringement of the patent of Peter Poillon, dated July 21, 1857, for an improved "*means of rendering joints steam-tight*" by the use of two steam pumps, having the plaintiff's invention in the steam slide valve.

MATHEWS and BETTS, *for plaintiff.*

I. Even if Mr. Poillon's patent claimed the machinery strictly in all connections, it is not anticipated by Mr. Cave's publication, for that is not as delineated and described a practical working engine. The space between the piston and cylinder is too large.

1. Mr. Poillon uses this piston in combination with steam machinery as described; it is a new and different organization. (*Clark's Patent Steam and Fire Reg. Co.*, agt. *Copeland*, 2 *Fishers, Patent Cases*, 227.)

II. But Mr. Poillon's patent is not a claim for the form of machinery, he expressly disclaims grooving the surface, it is only when a piston, or other part of steam machinery, con-

structed as described in his patent, is used in connection with steam, for the purpose of producing a frictionless or nearly frictionless packing that he makes any claim. It is when this form of machinery is used to develop the property of steam which Mr. Gale discovered that the patent operates.

III. Even if air in such machinery operates by the same law as steam, the discovery of Mr. Gale, and its embodiment in steam machinery is a good subject of a patent.

1. Steam is an obvious substitute for air; no person could tell without experiment trial and *dicovery*, that steam would perform the functions of air in this instance.

2. Its expansive force is so great as would without experiment, almost irresistably lead to the conclusion,that it would force itself between the piston and cylinder, notwithstanding the dimimution of its power by the grooves.

3. If to be assured of its practical operation, experiments would have to be made, it is the proper subject of a patent, although analogy based upon the laws which governs all elastic fluids, would seem to point to the discovery. (*Telegraph Co.*, agt. *Brett*, 70 *E. C. L. R.*, 882.)

4. Air is only practical in such a machine at a pressure of a few pounds to the square inch. It required invention and discovery to ascertain that steam would act practically at the vastly higher pressures requisite in steam engines.

5. Steam is infinitely more efficient than air, in this connection. It is a good invention to substitute a more efficient agent. (*Hali* agt. *Jarvis*, 1 *Webbs, Pat. Cases*, 100.)

6. Mr, Gale discovered this property in steam, and applied it in practice with beneficial effect. His discovery as applied is patentable, even though it should be admitted that the machinery is wholly old, and that the same property had been discovered in other fluids than steam. (*Derosue* agt. *Fain, as cited in Crane* agt. *Price*, 43 *E. C. L. R.*, 313; 4 *Man. and Granger*, 604; *Foote* agt. *Silsby*, 2 *Blatchf.*, 265; *Clark's Patent Steam and Fire Reg. Co.* agt. *Copeland*, 2

Fisher's Patent Cases, 227; *LeRoy* agt. *Tatham*, 14 *How.*, 256 (*opinion of* NELSON, J.); *LeRoy* agt. *Tatham* 22 *How.*, 132).

7. Mr. Poillon's patent is in effect for the production of a steam-tight joint, by a combination of steam with the machinery described, it will not be defeated by the prior publication of the combination of a different fluid and of inferior capacities with machinery of the same form, but of independent purpose.

The combinations are essentially dissimilar.

IV. But it is by no means clear, that steam, though it is doubtless possessed of the properties described in air, does operate in practice and pack itself upon the principle described by the witness Mr. Cave. Upon this we have two theories.

1. That of the witness Mr. Emory, who states it substantially similar to Mr. Cave, but who has never seen a steam piston act under circumstances, where he could watch its practical operation.

2. That of the witness Mr. Ames, who made the defendant's pumps, and of the witnesses Mr. Darlington, Mr. Sprague and Mr. Poillon, who had many times witnessed the practical operation of the piston, letting it rise out of the clylinder while under a pressure of steam, and when the apparatus was sufficiently hot to boil water standing on the top of the piston.

They all concur in the opinion that steam operates in practice in the great generality of cases, by condensing into water in the grooves, thereby forming a water packing, and lubricating itself, the water adheres in the grooves by attraction and friction, is more readily condensed by the increased force.

The result of this operation is the reverse of that described by Mr. Cave.

3. This was evidently the result of the practical experience of the inventor, Mr. Gale. He says "the grooves may

be one or many, at more or less distances apart, more or less wide or deep, and they may be perpendicular or more or less inclined to the moving surface and of any sectional form" (see patent).

V. There should be the clearest *evidence* not mere theories, to establish prior use in any form.

VI. The court will not be abstruse to invalidate a patent upon evidence of the prior publication in an obscure work, printed in another language, where it appears, that Mr. Gale was the discoverer of, and reduced to practice, an important principle in steam machinery.

When the prior publication described a different use, of differently constructed machinery, (and which as described is claimed not to be practical), for a radically different purpose, and by a clear perponderance of evidence proved to be effective if at all only by the operation of different laws than obtain in steam machinery.

VII. The patent should be sustained and and judgement rendered for the plaintiff.

L. D. COZZENS, *for defendant.*

Contended that the patent was a claim to the machinery, in itself, and that such machinery was fully described in a german work, entitled "*Schauplatz der Kunste und der Handuerke*" printed at Weimar, in 1847.

That the invention of plaintiff was a mere "*double use*" of an old machine.

That the patent if not for the machinery was a claim for a mere *principle*, or property of steam, and not patentable.

He cited, (*Morton* agt. *New York Eye and Ear Infirmary, M. S.*) That the patent does not distinctly point out what is new and what is old in the "*specification.*"

That the invention is insufficiently described.

The nature of the patent and claims of the defense are fully stated in the opinion of the court.

BLATCHFORD, J. This is an action at law, for the infringement of letters patent, granted to the plaintiff on the 21st of July, 1857, for a new and useful "means" for rendering joints steam-tight.

The invention was made by William S. Gale, and assigned to the plaintiff.

The specification speaks of the invention as "a substitute for all known means of packing pistons or other steam joints." It consists of a grooved or a corrugated surface with an opposing smooth or plain surface. The grooves may be made in the surface of the piston or in the interior surface of the clyinder as preferred. The specification describes as follows, the working of the structure:

The steam as it is let into the cylinder, rushes in between the piston and cylinder, and fills up the grooves and the intervening space, between the piston and cylinder, where it practically forms a complete packing.

The steam which fills the grooves and intervenes between the piston and cylinder, also acts as a cushion to practically relieve the piston and cylinder from contact and friction. The grooves may be one or many, at more or less distance apart, more or less wide or deep, and they may be perpendicular or more or less oblique to the moving surface and of any sectional form. The best method is to groove one moving surface and leave the opposing surface smooth, to make the grooves thin and frequent, and the corresponding ribs or flanges of the same or about the same thickness as the width of the grooves. The grooves need not be deep, from one-quarter to one-half inch will answer. The piston can be of any ordinary size and dimension now in use or a trifle larger. It should fit easy, and does not require to be in actual contact with the cylinder. To cut the grooves perpendicular to the axis of the joint or to the moving surface, and in the sectional form of a parallelogram is the better way, and sufficient for all purposes, and is the most simple and cheap in construction. See representation in the acompanying

drawing. It will be apparent that my grooves and intervening ribs may be used on any joint between two surfaces subject to the operation of steam under pressure, to cause steam to become self packing. The particular point of my invention and discovery, and its importance will be perceived from the following: Since the introduction of steam as a motive power, it has always been supposed that two contiguous surfaces could only be rendered steam-tight by actual contact. Hence, every steam engine that has heretofore been made has depended upon smooth surfaces in contact, or else upon some character of elastic packing, that would set steam-tight against its adjacent surface. To accomplish this, great varieties of metallic and other packings have been devised and vast expenses incurred to make the pistons and other moving joints steam-tight, and this course has heretofore been universally pursued. I believe myself therefore, to be the original and first inventor or discoverer of the fact that steam when introduced into small grooves is one of the contiguous surfaces will itself form a packing, within said surfaces actually being in contact. I, however, wish it to be understood, that I do not claim the grooved surfaces in themselves, as these have heretofore been used for other purposes and have been used in connection with air engines. The claim is to "the method herein described of causing steam to become a packing to itself in steam cylinders or other parts of steam machinery by allowing the steam to act in one or more grooves substantially as specified." The case has been tried before the court without a jury.

If the patent be valid the infringement is not denied. The defense is put upon the ground of a want of novelty in the invention; what is adduced to defeat the patent is a publication in a work in german, called the "Schauplatz" published at Weimar, in Germany, in 1847. The text of the publication is accompanied by a drawing and is this, as translated." Mr. Cave uses for his blowing machines a very ingeniously

arranged piston, whereby the leather packing becomes unnecessary, which is perfectly air-tight, has no friction, does not become heated, and requires no cost for keeping it in order.

This piston consists of a hollow cast iron ring, which has a diameter about two or three millimetus less than the cylinder, and whose outer surface has the greatest practicable number of annular and squares, depressions a, b, c, d. If now, for example, a piston arranged in this way goes upward and compresses the air which is found above it, and then this air, in part, presses in between the walls of the cylinder and the outer wall of the piston, having reached *a*, it freely expands, so that it compresses the air therein contained, and then loses for once a part of the force by which it had been pressed in, by which its motion is hindered, and there is opposed to it on the other side to which it tends to go, a certain resistance. It follows from this, that the air passed into *a*, works backward one after another, into the grooves b, c, d, with a force which constantly decreases, and which for a sufficient number of grooves can become zero. Therefore, theoretically considered, the number of grooves must stand in direct proportion to the pressure. Mr. Cave, has employed these pistons for very many blowing cylinders, and even too for one, of three metres in diameter. He has made careful experiments with this contrivance, and the results obtained agree in all respects with the theory; an essential condition for the employment of this piston is a perfect cirtricity of the cylinder a condition which we can now easily obtain by means of the vertical boring machine.

The first question to be decided is, what is the proper construction of the plaintiff's patent, if it claims merely arrangement of the grooves in one of the two surfaces? If one be a moving surface, then undoubtedly the arrangement of Mr. Cave, is an answer to the patent, but the specification says that the inventor does not claim "the grooved surfaces in themselves." Nor does he claim the use of the grooved

surfaces in connection with air, for the specification states that they have been used in connection with air engines. The inventor, from the language of the specification, may fairly be said to have had in view the explanations of Cave, which used grooved surfaces in an air engine. He puts his invention however, upon an entirely different point, and claims that notwithstanding Cave, he has made a patentable invention; he says that he has discovered the fact that steam may be made to pack in and of itself, or to become what he calls "self-packing;" that prior to his invention it had always been supposed that ever since steam has been introduced as a motive power, that two contiguous surfaces could be rendered steam-tight only by actual contact; that consequently all steam engines had depended for steam-tight moving joints on the contact of smooth surfaces or on elastic packing set steam-tight against its adjacent surface; that in carrying out this idea great varities of packing had been devised at great expense, and that he first discovered the fact, that steam when introduced into small grooves in one or two contiguous surfaces, will itself form a packing without the surfaces being in actual contact. It was not attempted to be shown on the part of defense that these allegations of the specification are not true, otherwise than by introducing the description and drawing of the Cave apparatus.

But it was insisted that air, the elastic fluid used in the Cave apparatus, operated therein in the same manner in connection with the grooves as steam, the elastic fluid used in the plaintiff's apparatus, operates therein in connection with the grooves, and that the grooves, and the grooved surfaces being alike in the two, and the air and the steam as used being equivalents for each other, there was no patentable novelty in using the grooves in connection with steam, but that it was merely the application of an old apparatus to a new use.

Opposed to these suggestions is the fact, that until this patent was issued the idea was not promulgated that steam

could be made self-packing, and the publication in "Schauplatz" that air could be made self-packing in an air engine, remained before the world ten years prior to the patenting of Gale's invention, without that being suggested, which is now asserted to be so obvious in view of the apparatus of Cave. The invention as set forth in the specification is a highly meritorious and useful one, and one which "courts will desire to sustain if consistent with the principles of law.

The claim is to the method herein described of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery by allowing the steam to act in one or more grooves substantially as specified. It is not possible to mistake the tenor and purport of this claim, when it is not read in connection with the rest of the specification.

It is a claim to an art or process; it is not a claim to the grooved surfaces, but it is a claim to the process of the self-packing of steam used in steam machinery when effected by allowing the steam to act in one or more grooves as described in the specification.

Gale undoubtedly was the first to discover that steam could be made to pack itself and that it could be made to do so by causing it to act in the way described in one or more grooves. The grooves used in an air engine, were indeed old, but it by no means followed, because air would work successfully, in the apparatus of Cave, that steam could be made to pack itself, or to do so by means of grooves, or to do so in the apparatus of Cave. There was room for experiment as to the capability of steam to act in that way, and as to the character of the grooves to be used, and as to what space might or might not be left between the contiguous surfaces. And it does not detract from the novelty or patentability of the invention, that in carrying it out in practice, the use of grooves, like those in Cave's apparatus, was found beneficial.

The claim is not to all methods of causing steam to become a packing to itself, in steam machinery; but to the method described in the specification, whereby the property of steam discovered by Gale is made to subserve a useful purpose by being carried into effect in a practical mode. The newly discovered property of steam, and the practical adaption of it to a useful end, by the means described is the invention made in claim.

It is difficult to distinguish this case from that of the Hanson patent for making lead pipe, which was sustained as a valid patent by the supreme court in "*Leroy* agt. *Tatham*" (22 *How.*, 132).

The Hanson's discovered that lead when recently set and solid, but still under heat and extreme pressure, in a close vessel, would re-unite perfectly after a separation of its parts. Availing themselves of this property of lead, the inventors succeeded in making by machinery, at a reduced expense, lead-pipe of a better quality than had before been known. The claim of the patent was to the combination of machinery employed, when used to form pipes of metal under heating pressure, in the manner set forth, or in any other manner substantially the same. The machinery used is shown to be in principle substantially the same with machinery which had before been used to make maccaroni, and with machinery which had before been used to make clay pipe. The claim was stated by the court to be a claim to the machinery only when used to form pipes of metal under heating pressure, and was sustained by the court against the objection that it only claimed the application of an old machine to a new use, or to produce a new result. The claim in the Hanson patent would have been the same to all intents, if it had claimed the method of causing lead to separate and re-unite at a welding heat, under pressure in a close vessel, by the use of the machinery described, to form lead pipe in the manner set forth.

The claim of the Gale patent would be the same in effect, if it were to claim the arrangement of the grooves substantially as specified, when used in connection with steam, to cause the steam by acting in the grooves in the manner described, to become a packing to itself in steam machinery.

I am satisfied that the Gale patent is valid; that the claim is sustainable; that the invention claimed is new and useful; and that the plaintiff is entitled to a verdict of $50 on the two machines proved to have been used by the defendant. The license fee fixed by the plaintiff being shown to be $25 on each machine.

CHENANGO COUNTY COURT.

SIDNEY LOBDELL, respondent agt. NATHAN B. STOWELL, appellant.

To entitle a defendant to insist upon an *award* upon the cause of action as a bar, he must allege it as such in his answer. It stands upon the same footing as a former judgment on the same matter in litigation, and must be pleaded to be available.

In an action of *trover* for the conversion of grain, the plaintiff is entitled to recover, as damages, the *highest market value* of the property at any time intermediate the conversion and the trial.

Where personal property, severable in its nature, as grain, is owned by *tenants in common*, and one of them appropriates the whole to his own use, and shows clearly a determination to deprive the other co-tenant of any portion of the common property, by locking up the same in his barn, and refusing to deliver to, or allow him to take any portion of it, an action of *trover* can be sustained for a conversion of the property.

April Term, 1865.

THIS was an action originally commenced in a justice's court. The plaintiff in his complaint claimed to recover the value of about one hundred bushels of corn, and fifty bushels of oats, which he raised on the defendant's farm in the town of Afton, in the year 1863, and which defendant had in his possession and refused to deliver to plaintiff, or to let the plaintiff have after demand by plaintiff, for which plaintiff claimed to recover $100 and costs. The defendant in his answer sets up:

First. A general denial.

Second. That the corn and oats were raised on his land, and that plaintiff had no right thereto. And he further claimed that plaintiff unlawfully took and carried away about fifty-three bushels of corn and about nineteen bushels of oats, and claimed to recover their value. The plaintiff recovered a judgment for $74.95 damages and $3.75 costs, from which judgment the defendant appealed to the Chen-

ango county court. The cause was tried in that court at the April term, 1865, before a jury.

Upon the trial in the county court the following facts were proved: The plaintiff, in the year 1863, worked a portion of the defendant's farm, situated in the town of of Afton, on shares—each to have one-half of the crop. The plaintiff raised one hundred and ninety-one bushels of corn, and fifty-two bushels of oats. The oats and corn were, by the consent of the defendant, put in defendant's barn by the plaintiff. The defendant put oats belonging to himself in the same bin with the fifty-two bushels raised by the plaintiff. The defendant used and sold eighty-eight bushels of the corn raised by the plaintiff. He had not used any portion of the oats. The plaintiff had used and sold fifty-three bushels of the corn and twelve bushels of the oats.

The parties subsequently agreed how the remainder was to be divided. By the agreement the plaintiff was to have of the balance of the corn and oats, forty-two and one-half bushels of the corn, and fourteen bushels of the oats. No separation of the oats and corn was made.

Subsequently, and about the first of April thereafter, the plaintiff went to the defendants' after the corn and oats, and defendant informed him he could not have them. The oats and corn were locked up. The plaintiff demanded the oats and corn of the defendant, and he refused to deliver them to the plaintiff, or to allow him to take them.

On the trial, the following question was asked the plaintiff: "What has been the highest price of corn and oats between first April, 1864, and this day?" which question was objected to by defendant as not the true measure of damages; that the true measure of damages should be the value of property and interest from conversion, or the highest price between conversion and trial in justice's court, or between conversion and commencement of suit in justice's court. The objections were overruled. There was evidence given, tending to show an arbitration between the parties.—The value of the

property exceeded $100. The defendant asked for a non-suit on the grounds:

1st. That the plaintiff had not made a cause of action.

2d. That one tenant in common or joint tenant cannot sue his co-tenant in this form of action.

The motion for a non-suit was denied. The jury under the direction of the court rendered a verdict in favor of the plaintiff for one hundred dollars. The defendant excepted.

A motion is now made by the defendant for a new trial on a bill of exceptions.

HENRY A. CLARK, *attorney for appellant.*
SAYRE and WINSOR, *attorney for respondent.*

H. G. PRINDLE, County Judge.—There was no question of fact for the jury to pass upon in this case. There was some evidence in the case in regard to what was termed by the defendant an arbitration. I hardly think what was shown amounted to an arbitration in regard to the corn and oats in question. The defendant could not avail himself of such a defense even had it existed, not having set it up in his answer. An arbitration and award of the subject matter of a suit stands upon the same footing as a former judgment on the same matter in litigation. "To entitle a defendant in a suit under the Code of Procedure, to insist upon an award upon the cause of action as a bar, he must allege it as such in his answer." (*Brazil* agt. *Isham and Earle*, 2 *Kernan*, 9).

I think this authority settles all question in regard to the arbitration. Even admitting that there was a valid award made, it could not avail the defendant without setting it up in his answer, in the same manner as he would a former recovery for the same cause of action.

The next question in this case is in regard to the damages. I am aware that the general rule of damages is the value of the property at the time of conversion and interest, to the

time of the trial, but it seems there are exceptions to this rule. The case of *Wilson* agt. *Mathews*, (24 *Barb.*, 295); *Willard* agt. *Bridge*, (4 *Barb.*, 361); and *Romaine* agt. *Van Allen*, (26 *N. Y. R.*, 309) are authorities in support of the rule adopted at the trial, and upon which I relied in allowing the evidence. I think the above authorities abundantly sustain the ruling at the trial. Were it an original question I should have been disposed to follow the old rule, of the value at the time of conversion, with interest to the day of trial.

The main question in this case arises on the motion for a non-suit. The evidence undoubtedly shows that the parties were tenants in common of the corn and oats in controversy, as the amount claimed by the plaintiff had never been actually separated; but the amount he was to receive had been fixed and agreed upon between the parties. The defendant had locked them up in his barn and informed the plaintiff that he could not have them, and refused to deliver either the oats or corn on demand.

I now propose to examine the question of law applicable to these facts, in order to ascertain whether or not the defendant was liable in this action to the plaintiff. The relation that tenants in common sustain to each other, and their rights and liabilities have been frequently discused and variously determined by the English courts and the courts of this country.

The general rule established by the courts of this state is, that one tenant in common cannot maintain trover against his co-tenant without showing a loss, sale or destruction of the property held in common. This rule is applied more particularly to the kind of property not severable in its nature or capable of being divided by weight or measurement.

I think the above rule has been in some measure relaxed, by the decisions recently made by our courts, or at least it has been conceded to be of universal application to all cases, where the rights of tenants in common are involved.

There seems to have been a distinction made in regard to the kind of property, whether it be of a severable nature or not. In the case of *Tripp* agt. *Riley*, (15 *Barb.*, 333), Justice JOHNSON, who delivered the opinion of the court, held "that the right of severance,amongst tenants in common, by one tenant of his share, always existed at common law as to all property in its nature severable. That where personal property is severable in its nature, in common bulk, and of the same quantity, is owned by several as tenants in common, each tenant may go and sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it without being liable to them in an action for conversion of the common property, and when one tenant in common takes from the common property, under such circumstances, if he does not take beyond his proportion or share, he will be presumed, in law, to have secured and taken his own, merely.

The rule would be different in the case of property not severable in its nature. As animals, for instance, where each tenant has the same right to every animal. And so of other property where the quality and value of one article or portion are different from that of other articles or portions, and each possesses a distinct and obvious identity. In such cases the partition must necessarily be by agreement, or by proceedings in equity.

I have quoted somewhat extensively from the opinion of the learned Justice, for the reason that I regard it as a clear and correct exposition of the law, and one that has some practical application to this case. The rule laid down by Justice JOHNSON in the above case was quoted with approbation and expressly adopted by the general term of the 8th district, in the case of *Forbes* agt. *Shattuck*, (22 *Barb.*, 568.) It is very obvious from the above decision, that there is clearly a distinction between cases where the property is divisable in its nature and where it is not. I think the above

authorities clearly hold that one tenant in common has the legal right, in case the property is severable in its nature, in common bulk and of the same quantity, to go and sever and appropriate his share of such property and the title of the other co-tenant becomes extinguished to the property thus appropriated. He may sell or destroy the same without being liable to his co-tenant. Suppose in such a case instead of taking only his own share he should take the whole, and lock it up in his barn and entirely ignore the rights of his co-tenant and refuse to allow him to have any portion of the property, can there be any question about his liability in an action of trover brought by his co-tenant for his half of the property thus wrongfully taken and converted to his own use? Would a sale, loss, or destruction of such property more completely deprive him of it, or give him any better legal or equitable right to an action against his co-tenant?

I think where property of the nature above mentioned is owned by tenants in common, and one of them appropriates the whole to his own use, and shows clearly a determination to deprive the other co-tenant of any portion of the common property, by locking the same up in his barn, and refusing to deliver to, or allow him to take any portion of it, that an action of trover can be sustained. In such cases the question of quality is not involved; it is only a question of quantity which can be easily determined by weight or measurement between themselves. The rule, I admit, would be entirely different in regard to property not divisible in its nature, such as horses, cows, sheep, &c. In such cases the question of quality is involved, and one party cannot compel a division without resorting to a court of equity for a partition. In such a case, if one co-tenant should go and divide twenty sheep held in common, and take ten of them into his possession and claim the exclusive ownership of the ten sheep so taken, still his co-tenant would own one-half of them, and such division and appropriation would not di-

vest his co-tenant of title in them, even if he had made a just division in regard to quantity and quality.

Had it been twenty bushels of oats and he had taken ten bushels, the title of his co-tenant would have been extinguished by the division and appropriation. The reason is that in the former case each tenant has the same right to every animal, and in such case Justice JOHNSON, in above opinion, says, "the partition must necessarily be by agree-"ment, or proceedings in equity." The only inference that can be legitimately drawn from this language is, that where the property is capable of being divided by weight or measurement, like grain, it is not necessary that the partition should be by agreement or proceedings in equity, but one tenant can make the division without the consent of his co-tenant, and if he is prevented by the other tenant from making the division by locking up the property, and showing an intention clearly to appropriate the whole to his own use, after a proper demand made and a refusal to deliver, he is liable to his co-tenant for a conversion of the property.

It cannot be said strictly that each tenant has the same right to every particle of the grain; if that were strictly true a separation and appropriation by one co-tenant would not divest him of such right, but he would still own one-half of the portion thus separated in the same manner as in case of separation of sheep. If the tenant under such circumstances has the right thus to separate and appropriate his portion of the property without the consent of his co-tenant, and without proceeding in equity for a partition of the property, (which he most clearly could not do in the case of property not divisible in its nature), I can see no reason why he cannot, without interfering with the general rule in regard to the rights of tenants in common, recover in an action of trover, when his co-tenant locks up the property and prevents a division, in a case where the law clearly gives him the right to his share of the property, without compelling him to go into a court of equity for a partition.

I have carefully examined all the cases decided by the courts of equity in this state, and in none of them has the precise point involved in this case been decided. The case of *Tubbs agt. Richardson*, (6 *Ver. Rep.*, 442,) upon which the defendant's counsel mainly relies in support of his position, was in regard to a quantity of wool held in common. I do not think that wool stands upon the same footing as grain; it could not be said to be of the same quality. Wool taken from a flock of sheep would not, under ordinary circumstances, be of the same quality, and if it was not, it could no more be divided accurately by weight or measurement, than the sheep from which the same was taken, and the judge who delivered the opinion in that case, made no distinction between the property in that case and any other property, not in its nature divisible. A different rule prevails in the state of Vermont, from the one established in our state. In 1 *Williams Ver. R.*, ——, the court held that a sale of personal chattels by one tenant in common is not such a destruction of the chattel as to enable the other tenant in common to maintain trover.

The defendant in this case has from the time of the demand to the day of trial entirely ignored the rights of the plaintiff to the property. He alleged in his answer that the crops belonged to him, were raised on his farm and plaintiff had no right thereto. He did not claim to be a tenant in common with the plaintiff until he made a motion for a non-suit in the county court.

The case presents this state of facts, simply. The defendant has in his possession forty-two and one-half bushels of corn, and fourteen bushels of oats, belonging to the plaintiff, in the same bin with other corn and oats. Plaintiff demands the property, the defendant refuses to deliver, and locks up his barn. Ordinarily, this is abundant evidence to sustain an action of trover for the conversion of the property. The property can be easily divided and delivered, if the defendant is disposed to act justly towards the plain-

tiff; but he will neither divide the property himself nor allow the plaintiff to take what belongs to him. Can it be possible that the plaintiff has no remedy, except to go into a court of equity for a partition of the property? If the value of the property were less than fifty dollars he would be remediless. I cannot believe that any such rule should be applied to this case. If the view I have taken of the law is correct, it very much lessens the number of cases where a resort to a court of equity is the only remedy for wrongs of this nature. I think it is the duty of courts to facilitate the modes of redress when it can be done without the violation of well settled principles of equity and justice, rather than be governed by ancient rules and maxims, which, when practically applied, render the means of redress so onerous and difficult of attainment, the law, instead of affording a remedy for an evil, allows the offender to violate it, and trample upon the rights of others, with perfect impunity.

I am of the opinion that a new trial should be denied.

This decision was affirmed by the supreme court in the 6th district, Justice MASON, delivering the opinion.

SUPREME COURT.

Hiram B. Hoxie agt. Wilson Greene.

Where after verdict a motion for a new trial on exceptions is ordered to be heard at the general term, in the first instance, the case cannot be reviewed on the question that the verdict is against the *weight of evidence.*

Where the defendant has the *affirmative of all the issues*, he has the right to the *opening and closing argument* to the jury.

So *held* on the trial of an action upon a promissory note which was transferred to the plaintiff by the payee when past due, and the defendant set up as a defense in his answer; 1st that the note was given without consideration. 2d that it was given under duress by threats of criminal prosecution and of personal injury, and injury to the property of defendant by the payee and his wife. 3d that the note was transferred to the plaintiff after it became due; and 4th that the plaintiff was not the party in interest nor the owner of the note.

Sixth District, Binghamton, General Term, January, 1869.

Balcom, Boardman, Parker and Murray, *Justices.*

Motion for a new trial on exceptions taken at the trial, and ordered to be heard at general term in the first instance.

Shankland and Couch, *for plaintiff.*

Ballard and Warren, *for defendant.*

By the court, Parker, J. This action is founded on a promissory note, dated, September 26, 1866, for five hundred dollars, payable to Daniel L. Wilson or bearer, on the first day of January, 1867.

The complaint after setting out the note, alleges, that the payee sold and transferred it to the plaintiff, on the 16th day of April, 1867, and that he was the owner of it.

None of these allegations are denied by the answer, but, it sets up affirmative defenses; 1st that the note was given without consideration; 2d that just before the giving of the note, the payee thereof and his wife corruptly colluded together, and falsely charged the defendant with having had

criminal intercourse with the wife of the payee, and demanded of the plaintiff that he should pay him (the payee) the sum of $2,500 dollars, as damages therefor, and thereupon threatened to kill him, and destroy his property, if he refused to comply with said demand. That under duress of such threats, and fear of their execution, he executed said $500 note, parcel of said $2,500, so demanded.

That said charge, so made against him, was wholly false. 3d. That the note was transferred to the plaintiff after it became due. 4th. That the plaintiff was not the owner of the note. Upon the trial, the plaintiff (under defendants objection that the cause of action stood admitted by the pleadings, and that the defendant had the affirmative of all the issues) proved the execution of the note and its transfer to the plaintiff at the time stated in the complaint, and read the note in evidence, with a computation of the interest thereon and rested. Evidence was then given upon both sides, on the first two issues made by the answer.

After the close of the evidence, the defendant's counsel claimed the right to make the closing argument to the jury, which was denied by the plaintiff's counsel. The court ruled that the defendant's counsel had the right so claimed by him; to which ruling the plaintiff's counsel excepted, and the counsel of the parties respectively addressed the jury in the order thus indicated. The jury found a verdict in favor of the defendant, whereupon an order was made and entered, giving the plaintiff sixty days to make a case and exceptions, and that the same be heard in the first instance at the general term.

The plaintiff's counsel makes a point, that the verdict is against the weight of evidence. That, is a question that is not reviewable here. Nothing but the exceptions taken upon the trial, can be ordered to, and heard by, the general term in the first instance. Applications for new trials, upon grounds other than those properly raised by such exceptions, must, in the first instance be heard and decided at the cir-

cuit or special term. (*Code*, § 265; *Cronk* agt. *Canfield*, 31 *Barb.*, 171, *and* 48 *Barb.*, 412).

The only question brought up by the exceptions, is whether or not the ruling at the circuit, that the defendant had the affirmative of all the issues, and consequently, had the right to the closing argument to the jury was erroneous.

It is very clear that upon the pleadings, the plaintiff was entitled to recover, without the production of any evidence on his part.

The defense is a confession of the facts alleged in the complaint, and an avoidance of their effect by the allegations of new facts.

The only issues between the parties, therefore, are raised by the allegations of the answer, which requiring no reply, are deemed denied by the plaintiff (*Code*, § 168). Upon those issues, the defendant then has the affirmative, and the plaintiff the negative; consequently, under the rule that the obligation of proving any fact, lies upon the party who substantially asserts the affirmative of the issue (1 *Greenl. Ev.*, § 7, 4); it was incumbent upon the defendant, to begin in the production of evidence. In other words, the burden of proof was on the defendant, and he had the right to begin and to reply, and consequently, the right to the opening and closing address to the jury. (*Huntington* agt. *Conley*, 33 *Barb.*, 218; *Elwell* agt. *Chamberlin*, 31 *N. Y. R.*, 611). If I am correct in the statement that the plaintiff was entitled to recover without the production of any evidence on his part, I do not understand the counsel for the plaintiff, to dissent from the conclusion above arrived at. He argues however, that the allegation of the plaintiff in the complaint, that the note was given "for value received" does not stand admitted by the answer, but is therein denied, and hence, that an issue is thereupon raised, of which the plaintiff has the affirmative and the defendant the negative.

The only form in which it is claimed that the answer gives any denial to the allegation referred to, is as follows: "The defendant for answer to the complaint of the plaintiff in this action avers that the instrument in the complaint mentioned, was given by the defendant to the payee mentioned without any consideration whatever." This is not a denial of the allegation in the complaint of the making of the note; if the defendant made the note as alleged in the complaint, he was liable on it, even to the payee, until it was impeached by evidence on the part of the defendant, for a consideration is presumed; so that it was not necessary for the plaintiff in suing upon it, either to state a consideration in his complaint or to prove one upon the trial (*Parsons on Notes &c.*, 175, *Ch. on Bills* 79, 8th *Am. Ed.*).

The averment in the complaint, that the defendant "made his promissory note in writing, whereby, by the name of Wilson Green, *for value received* he promised to pay" &c., must be regarded as an averment of the *making of the note described* and not of the fact of a valuable consideration received by the maker.

The words "for value received" are descriptive merely, (*Saxton* agt. *Johnson*, 10 *J. R.*, 418), so that notwithstanding the first defense above set forth, the plaintiff on production of the note, would be entitled to recover without the introduction of evidence. That defense does not put in issue anything alleged in the complaint, it is not a general or specific denial of any allegation in the complaint, but is matter in avoidance of the note.

The plaintiff starts upon the trial, free from any obligation to prove a consideration, but in so far as the subject of consideration is in controversy, the issue is raised by the affirmative allegation of the answer, that it was given without consideration; clearly then, the burden of proof upon this issue, is upon the defendant, and he therefore has the affirmative.

The plaintiff's counsel insists that the plaintiff had the affirmative of the issue made by the fourth answer. That answer is as follows:

The defendant for a further answer, avers, upon his information and belief, that the plaintiff in the action is not the real party in interest nor the owner of the note in question, and that he has no interest in the same. The averment in the complaint on this subject is "that the plaintiff Hiram B. Hoxie, on the 16th day of April, 1867, for a good and valid consideration, bought the above described note of Daniel L. Wilson therein named, and took a transfer thereof from the said Daniel L. Wilson, and is now the lawful owner and holder of said note."

Now, as no part of this averment is denied, even by inference, except the conclusion; the transfer, thereof, by Wilson to the plaintiff, pursuant to a purchase by him, stands admitted. That fact alone makes the plaintiff the lawful owner and holder of the note, and upon the pleadings he is now, unless since such transfer, he has parted with the same.

The 4th answer, is then an affirmative defense raising the issue, that the plaintiff has since such transfer, ceased to be the owner and holder of the note, of which the defendant has the affirmative. The plaintiff clearly could not be called upon, to prove that since the transfer to him, he had not transferred the note. Applying to the case, the test, as to the right to begin and close the case which the plaintiff's counsel recognizes as the true test, *for which party would the judment be, if no evidence is given?* There can be no doubt such right belonged to the defendant.

The ruling at the circuit was correct and the defendant should have judgment on the verdict.

All concurred and it is so ordered.

N. Y. COMMON PLEAS.

ADAM WEBER, respondent, agt. HORATIO N. FERRIS and others, appellants.

Where defendants indemnify the sheriff and direct him to go on and sell property in possession of and claimed by the plaintiff as owner, he being in fact the owner, they will be held liable as original trespassers, notwithstanding the proceeds of the sale was applied to an execution levied prior to that of the defendants.

General Term, January, 1868.

Before DALY, BRADY *and* BARRETT, *Judges.*

THE defendants had judgment and execution against the plaintiff's vendor, upon which they indemnified the sheriff, who thereupon sold out all of the plaintiff's property, and applied a part of the proceeds to a prior execution under which a formal levy had been made.

The referee found as a fact that the plaintiff's purchase from the defendant in the execution was *bona fide* and that he was the owner of the property seized and sold.

S. B. CUSHING, *for appellant.*
CHAS. FRAZER, *for respondent.*

By the court, BARRETT, J. This appeal presents no questions of law and, after a careful review of the case, we find ample evidence to sustain the referee's findings of fact.

The defendants as indemnitors and directors of the sheriff are liable as original trespassers (*Herring* agt. *Hoppock*, 15 *N. Y. R.*, 409; *Fonda* agt. *Van Horne*, 15 *Wend.*, 631; *Davis* agt. *Newkirk*, 5 *Den.*, 92; *Root* agt. *Chandler*, 10 *Wend.*, 110; *Allen* agt. *Crary*, 10 *Wend.*, 349). There is nothing in the point that the goods had been previously levied upon under a prior execution. That was a mere formal and technical levy which the officer would not have pressed without

an indemnity. It was made in the ordinary routine of duty, without instructions from the plaintiff in the execution. The seizure and sale of the goods and their consequent loss to the plaintiff resulted from the special instructions and indemnity given, upon their execution, by the present defendants. The application of the proceeds of the trespass was immaterial and the fact that they went to satisfy the first execution did not tend to mitigate the damages. The trespass consisted in the seizure of all the property, and the defendants, as directors and indemnitors, are liable for its full value. If they were unwilling to assume so great a responsibility, the particular part of the property upon which a levy was to be risked should have been pointed out and separated.

The judgment should be affirmed.

N. Y. SUPERIOR COURT.

J. S. JONES and others agt. ALEXANDER FOWLER and others

The general rule as to the *time of the delivery of goods sold* is, that where goods are to be delivered, and no time is specified in the contract, it is a presumption of law that the parties intended and agreed that they should be delivered in a *reasonable time*. What is a reasonable time is a question of law.

Where cotton was sold by bill on the 21st of the month, to be received by the purchasers from the wharf, without specifying any time of delivery, *held*, that a delay of four days in tendering a delivery was unreasonable. and that the refusal or neglect of the sellers to deliver on the demand of the purchasers on the 21st and 22nd relieved the latter from all responsibility.

General Term, January, 1869

THE action was to recover the difference between the contract price of certain bales of cotton and the price obtained on a sale thereof after tender of a delivery and a refusal to accept.

The plaintiffs proved that the contract of sale was made on the 21st day of November, 1867. The bought and sold notes of the parties were read in evidence. The following is a copy of the sold note:

"New York, November 21, 1867.

"Sold for Messrs. Freeman, Johnson & Co.,

"To Messrs. Fowler Brothers,

"The following cotton, including sound rebaled, viz.:

"Marks.	No. of Bales.	Stipulation.		Price per lb.
"W D / " W	35	B / C	at	18c.

"Compressed; to be received from wharf.

"Terms cash on delivery. DAYTON & WALDO,

"per J. H. G.,

"Cotton Brokers, 129 Pearl st."

The plaintiffs then proved that on the 25th of November they offered to deliver the cotton, and it was refused. Subsequently, they had it sold and it brought a less price than the defendants had agreed to pay.

The cotton, at the time of the sale to the defendants, was on board the steamer Zodiac, reported to be then in the harbor. *No offer to deliver the cotton was made previous to the 25th of November.*

One of the brokers who made the sale testified that he was requested by the plaintiffs to deliver the cotton to the defendants; that he went on the same day for the cotton, and it was not on the wharf; that he notified the defendants to attend and receive the cotton, but it was not on the wharf, and could not be delivered because it was not to be had That he went twice for it on Thursday (21st.), and again on Friday (22d). On Saturday (23d), defendants said they had filled their order elsewhere, and refused to receive it. This witness explained the meaning of the words "to be received from wharf" to be, that the cotton was to be delivered on the wharf by the seller, and taken off the wharf by the buyer.

Another of plaintiff's witnesses testified that all the cotton was not on the wharf until the 25th, on which day he took a letter from the plaintiffs to the defendants, notifying them that the cotton was ready for delivery.

A motion to dismiss the complaint was denied.

The defendants proved that they demanded a delivery of the cotton on Thursday, the 21st.

One of the defendants' witnesses testified that he went by the direction of the defendants to the wharf about one o'clock on Thursday (21st), to ask for the cotton; that there was no cotton out; that the brokers, or some one on their behalf, asked permission to let "the thing" lie over until the next day (Friday); that he went over to get a delivery of the cotton once or twice on Thursday, and three times at least on

Friday; the last time was about four o'clock on Friday evening.

The court directed a verdict for the plaintiffs, to which the defendants excepted.

Judgment was suspended, and the exception sent to the general term.

H. NICOLL, *for plaintiffs.*
H. H. ANDERSON, *for defendants.*

By the court, MONELL, J. There were no disputed facts in this case, and therefore no question for the jury. The main facts were sufficiently established, and the only question to be examined is, whether upon such facts the direction of the learned justice was correct. The contract of sale was made on the 21st of November. On that day, and again on the next day, the defendants demanded a delivery. The cotton was not delivered, for the reason that it had not been discharged from the vessel. On the 25th a delivery was tendered and refused.

The contract did not specify any time for the delivery, nor were there any extrinsic facts or circumstances which can materially aid the court in determining upon the time the parties had in which to perform. The case must, therefore, be disposed of, upon principles applicable to contracts, which are silent in respect to the time for their execution.

The question resolves itself into this: Did the demand made by the defendants on the 21st and 22d, and the inability, refusal, or neglect of the plaintiffs to deliver on those days, put an end to the contract and discharge the defendants; or, did the plaintiffs have until the 25th to make delivery?

The general rule is, that where goods are to be delivered, and no time is specified in the contract, it is a presumption of law that the parties intended and agreed that they should be delivered in a reasonable time. What is a reasonable

time is a question of law, to be determined upon the facts and circumstances of each case.

There is one fact in this case, which was proven, I suppose with the view of aiding the court in determining the question of reasonable time, which was, that at the time of the contract, the cotton was on board the steamer Zodiac, then reported as being in the harbor; that on coming up the bay, she got aground, and that her cargo had to be lightened to the city. The fact does not, however, in my judgment, help us in ascertaining what would be a reasonable time for delivery, however much it might, under certain circumstances, perhaps, *excuse* a delivery. It was not contemplated by the parties that any casualty would prevent an immediate execution of the contract, and cannot, therefore, be presumed to have entered into their intentions.

I cannot find anything in the contract, or in any surrounding fact or circumstance, to excuse an immediate delivery, or at least a delivery on demand.

The commodity sold, was capable of an immediate delivery, and no particular space of time was required to complete the sale by the symbolical delivery usual in such cases. The cotton was to be received by the purchaser upon the wharf. Placing it upon the wharf, and giving an order for its delivery to the purchaser, would constitute a delivery, and it would thereafter be his property, and at his risk.

There is nothing in the character of the property sold, that would indicate that four days would not be an unreasonable time for its delivery; nor is there anything in the circumstances of the sale that would lead us to the conclusion that the plaintiffs had the right to tender performance on the fourth day after the sale.

If anything is to be gained extrinsically, it is, that in the absence of express stipulations fixing the time of performance, parties intend and mean an immediate performance, provided, of course, the contract is capable of such per-

formance; and it would not be unfair to presume that the parties, in the case before us, contemplated, as well as intended, that the cotton should be delivered on the day of sale. Their acts indicate such intention. The plaintiffs and defendants, through and by their respective agents, went down to the wharf on the 21st, the former to deliver, and the latter to receive the cotton.

As I have said before, the casualty which prevented a delivery on that day, cannot enter into the question of reasonable time. For it may very well be, that to the defendants the delivery on the day of purchase, was of the very *essence* of the contract. They might have purchased for immediate reshipment or resale, either or both of which would have been defeated by the plaintiff's delay.

I am of opinion, therefore, that the delay of four days in tendering a delivery, was unreasonable, and that the refusal or neglect of the plaintiffs to deliver on the demand of the defendants releived the latter from all responsibility.

The exceptions should be *sustained*, the verdict set aside, and a new trial ordered, with costs to defendants to abide the event.

JONES and FITHIAN, JJ., concurred.

N. Y. SUPERIOR COURT.

JOANNA A. L. SLUYTER agt. GEORGE E. WILLIAMS.

In an action to recover the possession of personal property where it is wrongfully detained, a demand is necessary before suit brought.

Where a non-suit is granted and a judgment entered for a return of the property, the general term will not reverse, because the judgment is improper, but will leave the party to correct it by motion at special term.

General Term, May, 1869.

APPEAL from judgment at special term. The facts are sufficiently stated in the opinion.

GEORGE W. STEVENS, *for plaintiff, appellant.*
ALEXANDER H. REAVEY, *for defendant, respondent.*

By the court, FREEDMAN, J. The defendant lawfully came into possession of the goods and chattels claimed by the plaintiff in the action, and consequently, he could not be guilty of an unlawful detention except, after due demand, and a refusal on his part subsequent to said demand to deliver. It was incumbent on the plaintiff to prove a sufficient demand as a part of his case and as the evidence is totally insufficient upon the point, no error has been committed upon the trial in dismissing the plaintiff's complaint. In the case relied on by the the plaintiff (6 *Hill*, 613) the goods had been wrongfully *taken*, and for that reason no previous demand was held to be necessary.

If the judment entered is irregular in form, the plaintiff's remedy is by motion at special term and the general term will not upon appeal make the correction in the first instance.

The judgment appealed from should be affirmed with costs.

SUPREME COURT.

JAMES W. BLATCHFORD agt. ELMORE P. ROSS and others.

The *Merchants' Union Express Company* of the city of New York, by their articles of association, have no power nor authority to consolidate that company with any other, *without the consent of a majority of the stockholders.* Although the executive committee, and a majority of the trustees of that company, are authorized to amend the articles of association, they cannot make an amendment so as to authorize the consolidation of the company with any other, without the consent of a majority of the stockholders.

Where, however, under such an amendment of the articles of association, the company has been united with another express company, and the union substantially executed by a transfer of property, and by a large number of the stockholders of the former company, an injunction will not be retained to restrain the new company formed by the merger, from using the property transferred, or from receiving from any of the stockholders of the Merchants' Union Express Company, a surrender of the stock held by them to the new company, and a voluntary compliance of the terms of the agreement on their part.

But in regard to the property not delivered, the injunction should continue, and the directors and executive committee be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other shareholders, who are not willing to become members of the new company, by collecting the assessments on the shares of the stock, or in any other manner, until the decision of the case.

It is no objection to the continuance of the injunction that the company which forms the consolidation and merger, and its stockholders severally are not made parties—That company is in no way interfered with by these proceedings.

The decision for the appointment of a *receiver* on the ground of misconduct of the executive committee of the Merchants' Union Express Company in voting for appropriations of money to themselves and others, was reserved until a receiver who had been appointed some time since in regard to the property of the company not involved in the consolidation of the company, should be made a party and appear and answer in this action under a previous order of the court.

Special Term, February, 1869.

MOTION to make an injunction permanent.

STRONG and SHEPARD, *for plaintiffs.*

SEWELL and PIERCE, GEO. F. COMSTOCK and C. A. RAPALLO, *for Merchants' Union Company.*

THEO. M. POMEROY, *for the Trustees Merchants' Union Co.*

HOOPER C. VAN VORST and JOHN K. PORTER, *for Consolidated Company.*

INGRAHAM, J. This action is brought to restrain the defendants, who are officers of the Merchants' Union Express Company, and that Company from carrying out a proposed union and merger of the company with the American Express Company, in the American Merchants' Union Express Company, and for the appointment of a receiver. An injunction was granted restraining them from making, carrying into effect, or completing any merger or consolidation of the Merchants' Union Express Company with any other company, restraining them from transferring any property to the new company or to any other company, and the new company from receiving any moneys or property from the other corporation, and from enforcing and collecting an assessment on the stock of the Merchants' Union Express Company, which was alleged to be for the purpose of carrying out such consolidation. The injunction also contained some other provisions which were afterwards modified so as not to interfere with the business of the new company during the litigation.

A motion is now made to make such injunction permanent during the pendency of this action. The main question as to the validity of the proposed consolidation depends upon the construction of the articles of association and the power of the executive committee in altering the same.

I have not been furnished with a copy of the original articles of the association, but I gather from the pleadings that the original articles of association did not allow the union or consolidation of the company with any other, without the consent of a majority of the stockholders. That these articles contain a clause providing for an amendment of the original articles by a concurrent vote of two thirds of the executive committee and a majority of the trustees. That by a concurrent vote of the committee and of the trustees, the ar-

ticles of association were amended so as to provide that the Merchant's Union Express Company might be merged into or consolidated with any other express company, on obtaining the written consent of a majority in interest of the stockholders. That afterwards, by a similar proceeding, the articles of association were again amended so as to provide for such merger or consolidation, without requiring the previous consent of such majority of stockholders. And that in pursuance of such amendment the consolidation of the American and Merchant's Union Express Companies was resolved upon by the trustees and executive committee without any knowledge or assent of the great body of the stockholders until after such resolution was adopted.

The authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. Such authority to amend must be construed as intended for such amendments as were pertinent to the business and objects for which the association was organized. As well might the executive committee, under the power of amendment, assume to change the business of the corporation to one entirely different from that for which it has been organized, as to terminate the existence of the association and merge it into another. Such was not the object of the original articles, no such provision was contemplated, and to guard against it the stockholders had expressly provided that their consent should be necessary before any such change could be effected. At any rate such were the views entertained by the executive committee when the consolidation was first thought of, and in the first amendment the consent of a majority of the stockholders was deemed necessary, but no amendment was contemplated inconsistent with, contrary to, or destructive of the main objects of the association, and when the executive committee so extended their power they exceeded their authority.

They had no authority by such a consolidation to bring the stockholders under the increased liability for the debts of another company, and expose them to "loss" which might not have existed before or which might follow from the introduction of a new company or association, and a surrender to such new company of all the property of the association. Thus in the case of private associations the unanimous voice of the stockholders was regarded necessary to change its provisions. (*Livingston* agt. *Lynch*, 4 *Johns. Chan. Rep.* 573), and even an act of the legislature was held insufficient to compel a change of business in a corporation from what was originally contemplated, without the consent of the stockholders. (*Hartford and New Haven Railroad Company*, agt. *Croswell*, 5 *Hill*, 383.)

In the case of *Church* agt. *Financial Corporations*, (5 *vol. Eng. Law Rep., Eq. Cases*, 450), it was held that an agreement for amalgamation with another company was not within the power of the directors, although the articles authorized the directors to amalgamate with any company formed to carry on any business included in the objects of the company, in a case in which an assessment was made upon its stockholders for the purpose of carrying out the amalgamation. In the *Imperial Bank of China* agt. *Bank of Hindostan*, it was held that under the provisions of act of 1862 (requiring assent of stockholders), an arrangement for the transfer of the business of the company to another, and providing for an assessment on the shareholders was not valid, and that assessment of the shareholders must be by all the members, (6 *vol. Eng. Law Rep., Eq. Cases*, 91). It is proper, however, to add that although the last two cases referred to are controlled by the provisions of a statute, somewhat differing from any statute in this state, the general principles in both cases may be well applied to the case under consideration.

Upon this branch of the case I think it is clear that the proposed merger of the company, in another, without the consent of the stockholders, is, as to those who do not agree,

utterly beyond the powers of the executive committee and directors, and if the union had not been substantially executed by a transfer of property, and by a large number of the stockholders, it should be enjoined until the final hearing of the case.

So far as the transfer of the property has been made no benefit will accrue to any of the parties to have the new company enjoined from its use, or from receiving from any of the stockholders of the Merchant's Union Express Company, a surrender of the stock held by them to the new company, and a voluntary compliance of the term sof the agreement on their part. If the stockholders who have not yet accepted of the terms so agreed on between these companies elect sc to do, and to become stockholders in the new company, there is no good reason for restraining them from so doing, but in regard to property not delivered, the injunction should be continued, and the directors and executive committee should be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other shareholders, who are not willing to become members of the new company, by collecting the assessments on the shares of the stock, or in any other manner until the decision of this case.

It is objected, however, to a continuance of this injunction that the Americon Express Company, and the stockholders severally are not made parties. That company is not in any way interfered with by these proceedings. Their stockholders are free to become members, and that company is not enjoined from any disposition of its property that may be desired by its managers. The interest of the company, if any, is so remote that it affords no grounds for relief to the plaintiff.

Nor is the want of making all the stockholders defendants a good objection. Where they are as numerous as they are in this case, it is not necessary. It is enough if some of the class are parties, who, on behalf of all, may either prosecute

or defend. The plaintiff here represents one class, and sues for himself and others who choose to come in, and who have not become stockholders in the new company,. The defendants represent the executive committee and directors, who are in favor of the union of the companies, and can litigate for the benefit of the other class. Even if it were otherwise, the means provided for bringing in other parties are such that relief by a temporaay injunction should not on that account be denied.

The other branch of this case relates to the appointment of a receiver. This is based mainly on the alleged misconduct of the executive committee in voting for appropriations of money to themselves and others for services at various times during the past two years, before and after the organization of the company. These votes are shown by extracts from the minutes of the committee, which at least exhibit very liberal appropriations of the money of the stockholders for their own benefit, large amounts of which are said to be for services prior to the organization of the company. The impropriety of voting such moneys to themselves for extra services is shown by the cases of (*Gardner* agt. *Ogden*, 22 *N. Y.*, 332, *and Butts* agt. *Woods*, 37 *N. Y.*, 317.) Thus, in April, 1866, $500 monthly was voted to each of the executive committee and others, which in August was increased to $700 monthly, to commence on January 1st, 1866. In April, 1867, $2,500 was voted to each member of the committee, as compensation for services rendered the company. In may, 1867, an advance was voted to Joslyn & Co. of $25,000 to protect the interests of the company from assaults made by other express companies, and in September, 1867, a further sum of $40.000. In May, 1866, $5,000 was voted to each member of the committee annually, which in September was reduced to 2,500. In October, 1867, $8,000 was voted to each member of the comittee for services for 1866 and 1867, and to be for ser-

vices in organizing the company. And in December, 1867, to each member of the executive committee and the attorney of the company $50,000 for services prior to the organization of the company in devising ways and means by which the company might be formed, &c., upon condition that each member immediately invest the same in the stock of the company. In May, 1868, the last resolution was repealed, and the treasurer was directed to cancel the indorsement of $50,000 on the checks of the executive committee, in pursuance of the former appropriation, but whether the stock was or was not issued to the executive committee under that resolution does not appear. In May, 1868, a loan to C. T. Backus of $20,000, on his notes, for which no cause is stated in the resolution. In May, 1868, a resolution was passed directing the issue to two of the executive committee of 750 shares of stock, and to another of 500 shares, in consideration of their retiring from the executive committee, and as compensation for services, as promoters and originators of the company, in addition to compensation previously received.

These resolutions were all passed by the executive committee in their own favor, and it is claimed by the plaintiff, that such resolutions are void, and that a receiver is necessary to recover back the same for the benefit of the company. Of the impropriety of grants of such large sums for such purposes there can be little doubt, and in the condition in which this company, the Merchants' Union Express Company, is now placed, there could be no impropriety in deciding in favor of the appointment of such receiver.

A receiver was appointed some time since, in regard to the property of the company, not involved in the consolidation of the company with the new express company, and the plaintiff has an order allowing him to be made a party to this suit. The order restraining him from parting with any of the funds received by him will protect the plaintiff

as fully as if a new receiver were now appointed, and it is but proper that he should be heard after he is brought in as defendant, before any order for a new receiver is made. For this reason therefore, I reserve any order on this branch of the case, until after the receiver has appeared and answered; the plaintiff may then renew such application in such way as he may be advised.

Objections have been made to the right of the plaintiff, to take these proceedings because he is the holder of stock purchased from one who had assented to the consolidation, and because he had delayed in bringing this action until after the consolidation was partially effected.

If this action was solely for the purpose of preventing the consolidation there would be force in these objections, but this action is for other purposes. Under the exception as to the consolidation as above suggested, those stockholders who are willing to do so, will be allowed to become stockholders in the new company, and their rights are not interfered with. As to the others they may have a right to claim from the remaining funds of the company their share of the interest they have in the stock, and to have the right of the appropriations heretofore referred to inquired into through a receiver. For such purposes those objections are in no way applicable in opposition to maintaining this action.

Nor is the want of parties as to the American Express Company, or the other stockholders, any ground of objection.

That company is only interested in carrying out the consolidation, and the same is not interfered with by the injunction, and the other stockholders are not necessarily parties, when they are so numerous, and when they are represented by sufficient of their class to defend the action on their behalf.

The injunction therefore is retained as originally modified, with the further modification in permitting such of the

stockholders as so claim to exchange their stock for that of the new company, and to pay the assessment thereon, and reserving any decision as to receiver, until after the present receiver shall be made a party, and shall file an answer in this action.

NEW YORK COMMON PLEAS.

WARD agt. GORE.

Where an action *between partners* for an accounting and settlement of partnership affairs was commenced by the defendant against the plaintiff by the service of a complaint; another action subsequently commenced by the plaintiff against the defendant for the same cause, cannot be sustained, although the complaint in the latter contains special averments and asks extended relief, but without changing the character of the action.

Special Term, January, 1868.

E. DELAFIELD SMITH, *for plaintiff.*
D. D. LORD, *for defendant.*

BARRETT, J. The point is well taken, that there is another action pending between the same parties, for the same cause of action, (*Code* § 144, *sub.* 3.) The special averments contained in the present complaint, and the extended relief sought, do not change the character of the action. It is nothing more nor less, than an ordinary action between partners, after a dissolution for an accounting and settlement of the partnership affairs. Prior to the commencement of this action, the present defendant had actually served his complaint in a similar action in this court against the present plaintiff. In the action first commenced, the averments were fewer and the prayer simpler and less special. But the action was the same, and indeed all the averments of the present complaint and affirmative relief of quite as comprehensive a character could have been, and may yet be, there set up and demanded. The cases too fully support the objection. (*Groshon* agt. *Lyon*, 16 *Barb.*, 461; *Hornfager* agt. *Hornfager*, 6 *How., Pr. R.*, 279; *McCarthy* agt. *Peake*, 9 *Abb. P. R.*, 164).

The temporary injunction must be dissolved.

SUPREME COURT.

PETER BALJA, respondent agt. DANIEL RAWLEY, appellant.

Where a disputed question as to an *agreement* by the defendant to allow plaintiff to saw a certain quantity of wood on the farm of the defendant for about two months after the lease from the defendant to the plaintiff of said premises, was surrendered and given up, having been fairly submitted to the jury, on a trial in the county court, on appeal from a justices' court, and they having found in favor of the plaintiff, their finding is *conclusive*, on appeal to this court.

Such an agreement being based upon a good consideration is valid by *parol*.

An objection taken by defendant on the trial in the justices' court, that plaintiff, by his own showing, had brought *title to land in question*, which was disputed by defendant, is an intermediate objection, arising during the trial out of the evidence offered or introduced, and to bring the same before the county court, it would be necessary to show a portion, if not all of the evidence given on the part of the plaintiff to enable the county court to judge correctly as to the merits of the objection.

The Code (§ 360) says the justice need not return any of the evidence. Of course that section does not contemplate that the county court shall hear an issue of law on parol evidence of what took place in the justice's court. Besides, th e question of title in fact, did not arise in this case.

Sixth District, Binghamton, General Term, November, 1868.

Before BALCOM, BOARDMAN, PARKER *and* MURRAY, *Justices.*

ON the 4th day of December, 1861, the defendant was the owner of a farm of land situated in the town of Solon in the county of Cortland; and on that day leased the same to the plaintiff, for the term of five years commencing on the first of March, 1862; at which time plaintiff took possession of the farm under the lease, and continued in the possession of the whole premises until the 26th of January, 1864, when some difficulty arose between the parties in relation thereto, and they entered into an agreement by which the said lease was surrendered, and the defendant re-took the possession of the said premises, except that the plaintiff was to live in the house and keep his stock on the farm until the first of March, 1864. Plaintiff insists that it was also agreed that he was to have the privilege of sawing up

a certain quantity of wood thereon. The defendant denies that there was any such agreement. The plaintiff in accordance with his understanding of the agreement, attempted to saw up such wood thereon, and was prevented by the defendant interfering with, and about, the sawing machine, and was forbid bringing the machine on the premises.

The plaintiff brings this action in trespass for thus interfering, which was first tried before a justice of the peace, in Cortland county, and plaintiff obtained a judgment of $40.00 from which defendant appealed to the county court of Cortland county, where it was retried, and plaintiff obtained a verdict of $62.50. Defendant applied to the county court for a new trial, which was denied, and judgment was entered in favor of the plaintiff, and defendant appealed to this court.

WATERS and WATERS, *for appellant.*
BALLARD and WARREN, *for respondent.*

By the court, MURRAY J. The disputed question as to the agreement by the defendant to allow plaintiff to saw a certain quantity of wood on the premises of defendant, after the lease was surrendered, having been fairly submitted to the jury, and they having found in favor of the plaintiff, their finding is conclusive.

The agreement by which the plaintiff reserved the right to saw wood on the defendant's farm for a term less than two months being based upon a good consideration, was valid by parol. But by several exceptions, taken upon the trial to the reception of evidence, and by the two motions for nonsuit and an exception taken to the judge's charge in submitting to the jury whether such a right was reserved or not, the point is made by the defendant, that the proof on the part of the plaintiff on that question, showed that the title to real estate came in question, and was not within the issues to be tried by the county court.

By subdivision 4, of section 366 of the Code, the county court may try the title to lands, on appeal from justices' court, if within the issues framed (*Whitcomb & May* agt. *Greene*, 2 *Denio*, 113). The question if presented by the proof, came fairly within the issues, and was properly tried. But a question of title did not arise on the trial. By the agreement between the parties, that plaintiff might saw up a certain quantity of wood on defendant's farm, then lying thereon and belonging to the plaintiff—all to be done within two months, is not an agreement with relation to the title to real estate. It gives the plaintiff no estate in the premises. It is a mere privilege thereon, admitting the title to be in the defendant, and was within the issue, and proper to be tried and submitted to the jury. There was no error in the rulings in relation thereto, and none in the charge, (*O'Reily* agt. *Davies*, 4 *Sandford*, 722—2 *Wait's Pr.*, 30; *Doolitle* agt. *Eddy*, 7 *Barb.*, 75). The plaintiff in making out his case, offered in evidence a lease of defendant's farm for five years, given by defendant to plaintiff, in December, 1861, and which was surrendered on the 20th day of September, 1864, when the subsequent parol agreement referred to above, was made; and on such surrender, and as a part consideration thereof, it is insisted the said parol agreement was made. That lease was objected to by defendant, on the ground that it was not within the issue to be tried. It was proper and competent evidence to show the transaction out of which the subsequent agreement arose. (*Nichols* agt. *Bain*, 42 *Barb.*, 353, *same case* 22 *How. Pr. R.*, 286; *Maine* agt. *Cooper*, 25 *N. Y. R.*, 184).

The defendant offered to prove by the justice before whom the cause was tried, that from plaintiff's own showing before him, the title to real property was in question; that such title was then disputed by defendant, and he was asked to dismiss the cause, on that ground and refused.

On a trial before a justice of the peace, when by plaintiff's own showing the title to lands comes in question, and

that title is disputed by defendant, it is the duty of the justice to dismiss the cause (*Code, sec.* 59). If he refuses to dismiss the cause, and proceeds with the trial, he proceeds without jurisdiction and his proceedings are void. (*Gage* agt. *Hill*, 43 *Barb.*, 44).

It is contended on the part of the defendant that this is such a case; that after it so appeared, and title was disputed, the justice proceeded without jurisdiction and rendered judgment for plaintiff, and that defendant appealed from that judgment and had a retrial in the county court, and he insists that he has the right to prove it in the county court, by parol, and that on such proof the county court should have dismissed the cause.

By section 360 of the Code on an appeal where a retrial is to be had, the justice is required to return the papers with proof of service, pleadings, proceedings and judgment. It is expressly provided that the evidence need not be returned. By section 366 of the Code, it is provided that the county court on a retrial shall proceed to a hearing of the cause, if the issue joined before the justice, was an issue of law, or to a trial thereof by jury, if such issue was a question of fact. If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case, and if such judgment be against the pleadings of either party, an amendment of the pleadings may be allowed on the same terms and in like cases as pleadings in actions in the supreme court. And the court may thereupon require the opposite party to answer such amended pleadings, or join issue thereon, as the case may requre, summarily.

If upon an appeal in an issue of law, the court should adjudge the pleadings complained of, to be valid, it shall in like manner require the opposite party summarily to answer such pleadings or join issue thereon, as the case may require.

Upon an issue of fact being joined, the court shall proceed to hear the same tried by a jury in the same manner as issues joined in the supreme court are tried. Every issue of fact so joined or brought up on an appeal, shall be tried in the same manner, as in actions commenced in the supreme court. By section 64 of the Code there are two kinds of issues formed in the justices' court, an issue of fact, formed by complaint and answer, and an issue of law, formed by the defendant's demurrer to the complaint or plaintiff's demurrer to the answer. The question here arises, is the county court on a retrial authorized to try any other question except those arising on the trial of the issues as formed under the 64th section of the Code? Section 360 and 366 of the Code, providing for a return of the justice on retrial in the county court, is very similar to sections 194 and 210 and several following sections of *2d R. S., page*, 260 and 262, providing for the justices' return and a retrial of the cause in the common pleas on appeal from justices' court, with this exception: that § 360 of the Code, requires the justice to return the process and proof of service, and § 194 of *R. S.* did not require it. Under that statute, it was decided that before the issue was joined before the justice, the defendant by objection, or motion to dismiss, could bring up a question affecting the jurisdiction of the justice over the person of the defendant, or the subject matter of the action, and if the objection was overruled, he could join issue and try the cause, and on appeal on a new trial, renew the objection or motion, in the county court; and if the court erred in its rulings, the defendant could take advantage of it on appeal to the supreme court. It was regarded as an issue of law formed in justices' court. (*Bennett* agt. *Ingersol*, 24 *Wend.*, 113; *Malone* agt. *Clark*, 2 *Hill.* 652; *Swartwout* agt. *Roddis*, 5 *Hill.*, 118).

Wait in his practice (2 *vol., pages*, 809, 810) lays down the same practice as applicable and proper under the Code, in case of retrial in the county court. Such motions and

such objections are allowable in justices' court under the present practice.

And according to the principle of the above cited cases it would be an issue of law, and come within the provisions of the Code (§ 368).

The objection in the case at bar, being that plaintiff by his own showing had brought a title to land in question which was disputed by defendant is an intermediate objection arising during the trial out of the evidence offered or introduced, and to bring the same before the county court, it would be necessary to show a portion, if not all of the evidence given on the part of the plaintiff, to enable the county court to judge correctly as to the merits of the objection. The Code § 360, says the justice need not return any of the evidence. It will hardly be contended that the legislature in forming § 360 of the Code, contemplated that the county court should hear an issue of law on parol evidence of what took place in justice's court.

I conclude from this, that this question is not an issue of either law or fact to be tried or heard in county court on appeal from justices' judgment, under § 366 of the Code.

The judgment should be affirmed with costs.

BALCOM, P. J., PARKER and BOARDMAN, J, concur in the result.

N. Y. SUPERIOR COURT.

ELIZABETH BAKER agt. THE UNION LIFE INSURANCE COMPANY.

Where *notes* are given for a premium on a *life policy of insurance*, which are accepted and received by the company, and are *receipted on the policy as so much cash*; in an action against the company by the widow of the husband who was insured for the benefit of his wife, the company is *estopped* from denying the payment of the premium in cash, where there is no evidence that the widow had any knowledge that her husband gave notes instead of cash.

And this result is not changed by evidence produced on behalf of the company that one of the notes had not been paid at maturity by the husband, previous to his death; and the production of a printed memorandum, placed on the margin of the policy which says, that if any promissory notes given under said policy are not paid at maturity, the policy shall become void.

The *receipt* of the company is a receipt for *cash*, to the wife who is benefited by the policy, and must be construed as a part of the agreement.

General Term, March, 1868.

THIS is an action to recover the sum of ten thousand dollar, being the amount of a policy on the life of the husband of the plaintiff.

The facts are stated in the opinion.

Mr. MOORE, *for plaintiff.*
Mr. JERNEGAN, *for defendants.*

By the court, MCCUNN, J. In December, 1864, Mr. Baker, the husband of plaintiff, insured his life for and on account of his wife in the company of the defendants, for ten thousand dollars, and gave his notes for the premium, which notes were accepted and received by the company, and were receipted on the policy as so much cash. The policy was then taken by Baker and given to his wife, and there was no evidence before the court, that she had any knowledge that her husband had given his notes for the premium on the policy, instead of cash. One of the notes became due

and was not paid at maturity, and Baker promised repeatedly to take up the same, the company indulging him as to time. Baker finally died before the note was paid, and the plaintiff, his wife, brings suit on the policy. The defendants answer and say, that by reason of a certain printed memorandum (they call it an agreement), placed on the margin of the policy wherein it says, that if any promissory notes given under said policy are not paid at maturity, the policy shall become void—that they are not bound in law to pay, but on the contrary are released from all their obligations in that respect.

After a careful view of the law, looking at all the facts as they stand in the case, we are clearly of opinion that the plaintiff is entitled to recover. We hold that where the wife's interest in her husband's life is insured, and the husband's notes are received and receipted as cash to the wife or the person to be benefited by the policy, it is a receipt in payment as cash, and the receipt is a part of the agreement. This is the rule laid down in the case of *Goit* agt. *National Protection Insurance Co.* (25 *Barb.*, 190), and in that case the facts are not near so clear and strong in favor of defendants as they are in the case under consideration. In this case the wife for whom the policy was effected did not know but that her husband had paid the cash for her premiums; they were receipted as cash on her policy by the company; and, for aught we can tell, if she had known the money had not been paid she might have advanced the premiums herself. But even if the plaintiff had given the notes herself, or was cognizant of the fact that they were given instead of money for the premium, the policy under such a clause is not void because of the nonpayment of the note, but voidable only at the election of the company. Instead, however, of electing to avoid the policy, the company assented to the delay in payment, and were expecting from day to day the proceeds of the note from Baker, the the husband, and they held the other notes not yet due or

earned, and up to his death had taken no step indicating an intent to forfeit the policy; and as there is no dispute that payment of the notes at maturity was waived, and as no agreement was thereafter made with plaintiff to change her rights, the company was and is liable to her, and can only look to the collection of Baker's notes. Nay, more, I shall hold that a knowledge on the part of the company of the nonpayment of the note is a notice of the breach, and any extension of the time thereunder was a full waiver of the forfeiture.

There is another view of the case which must, to my mind conclude the defendants. I mean the view that they are estopped from denying the payment of the premium in cash by their town acts in giving the receipt for cash. The rule of law is clear that where one, by his own words or conduct, causes another to believe the existence of a certain state of things, and induces him or her to act on that belief, the party so doing is concluded from averring or proving a different state of things as existing at the time he made such representations. In legal parlance, this is termed estoppel. This was the rule held in the Queen's Bench in the case of *Packard* agt. *Sears*, (6 *Adol. and El.* 469); so also in the case of *Freeman* agt. *Coot* (2 *Exch. R.*, 654).

Baron PARK holds "that where a party gives a receipt or writing, and knows at the time he is giving it, that the same is untrue (as in this case), he gives it with the understanding that it will be acted upon and used against him as if it were true. If in this case the company did not intend that these notes should be received as cash on account of the premiums of this woman's policy, why did they not say so in their receipt? It would certainly have been as easy for them to say notes as to say cash. But they intended the notes to be received as cash, they were received as such, and they must be strictly held to that construction. Indeed, there never was a case wherein the doctrine of estoppel can so completely apply as in this case. Estoppel, as applied

in such a case as this, is not made applicable upon the ground of wilful misrepresentation or fraud in making the admission or declaration, but upon the ground that it will be a fraud to show that it is untrue, to the prejudice of a third party and of one who has acted upon the faith of the statement. In this case the plaintiff saw the receipt upon her policy, and saw that the language of that receipt said the premium was received in cash, and she acted upon that statement, and we cannot allow this company, after the death of her husband, to take advantage of their own misstatements in that receipt. For all we know, as I have said before, this very receipt may have prevented her from paying the notes, and it would operate as a fraud to permit its denial, and this is the very essence of estoppel.

The rule would be the same if a creditor, interested in the life of his debtor, was insured, and the insurance perfected by the debtor, and the premium received by the company was in the notes of the debtor; but thus receipted in cash, could the company dispute it? By no means. Then the rule should be just as strictly applied in this case.

Judgment affirmed with costs.

SUPREME COURT.

MARGARET FLANAGAN agt. BRIDGET TININ and TIMOTHY TININ, her husband.

Where a *personal injury* is committed by the wife alone, both the husband and wife are liable. And where judgment is rendered against both, the *execution* must follow it and direct the collection of damages and costs out of the property of both.

Where there is *real estate* of a defendant upon which a judgment against him is a lien, and execution thereon is issued during his life-time to the sheriff; if the sheriff on finding no personal property of the defendant returns the execution *nulla bona*, the court, on motion, will order the return of *nulla bona* to be *canceled*, and the execution *taken from the files and returned to the sheriff* to the end that he may proceed and sell the real estate by virtue of it.

Where a defendant *dies* after the issuing of execution against his property and within five years after the rendition of judgment and the issuing and return of the execution, no consent or order of the court is necessary on issuing a second execution.

Jefferson Special Term, October 19, 1868.

THIS action was brought to recover damages for an alleged assault and battery, in October, 1864. Issue was joined in said action and a trial was had in March, 1866, and a verdict rendered in favor of the plaintiff for $50 damages and a judgment was rendered for said sum on the 1st day of March, aforesaid, and $109.98 costs.

On the same day a *fi. fa.* was issued on said judgment to the sheriff of Jefferson county and by him returned wholly unsatisfied on the 7th Januray, 1867. On the 13th day of June, 1866, Timothy Tinin, one of said defendants and the husband of the said Bridget, died, leaving him surviving, the said Bridget and four children, his heirs at law, all of them under fourteen years of age and residing with their mother. On the 15th day of November, 1867, the said Bridget was duly appointed administratrix of the goods, chattels, &c., of said Timothy, deceased, by the surrogate of Jeffereson county and she took upon herself the duties of said office.

There was no personal property belonging either to said Bridget, or said estate with which to pay said judgment, but that said Timothy died seized of real estate in said county of sufficient value to pay said judgment.

On the 20th November, 1867, a petition was presented to the surrogate of Jefferson county, for leave to issue execution on said judgment. The prayer of said petition was granted.

The plaintiff here moved for leave to issue execution for the reason, as claimed by the plaintiff's counsel, that the practice requires the consent of the court in which the judgment was recorded, as well as that of the surrogate, that execution issue when the defendants or one of them has died.

MOORE and MCCARTIN, *for plaintiff.*

MULLIN, J. The injury for which the action was brought was done by the wife alone; and for that injury both the husband and wife were liable. (1 *Chittys Pl.*, 82.)

The judgment being against both, the execution must follow it and direct the collection of damages and costs out of the property of both.

The judgment became a lien on the real estate of which the husband was owner at the time of the rendition thereof and on such as he thereafter acquired. The execution having issued during his life it was competent for the sheriff to have seized and sold the real estate, and out of the avails to have paid the judgment.

Why it was returned *nulla bcna* in January, 1867, when there was real estate out of which satisfaction might have been obtained is not disclosed. Had the sheriff performed his duty this application would not have been necessary.

The proper relief under the circumstances would be to cancel the return of *nulla bona*, take the *fi. fa.* off the files,

and return it to the sheriff to the end that he might proceed and sell the real estate by virtue of it.

The death of Timothy did not impair the lien of the judgment nor the right of the plaintiff to enforce it against the land bound by its lien. The title therefore passed to the heirs charged with the lien.

But if the question is now to be considered as if no *fi. fa.* had issued during the life of the judgment debtor, then it can only issue at the end of a year from the death and by permission of the surrogate. (2 *R. S., 2d ed.*, 368, § 27; 3 *R. S., 5th ed.*, 642, § 30.)

Permission from the court in which the judgment was recovered to issue execution is only necessary after the expiration of five years from the recovery of the judgment and then only in the event that an execution has not been issued within five years. (3 *R. S., 5th ed.* 642, § 1; *Code*, § 283–284.)

By the last clause of the first paragraph of § 284 it is declared that leave to issue execution shall not be necessary when an execution has been issued within the five years and returned unsatisfied in whole or in part.

In this case the *fi. fa.* was issued within five years, and has been returned wholly unsatisfied; therefore by the very terms of the section under consideration, leave from this court is not necessary.

I have been referred to the case of *Alden* agt. *Clark*, (11 *How.*, 213) in which the general term of the 4th district intimated, in no case could an execution issue after the death of the defendant therein without leave of the court.

The remarks of the learned judge who delivered the opinion of the court in that case as to the necessity of leave within five years from the entry of judgment were not called for by the case before him, and it seems to me quite clear that as the law then stood execution might issue by leave of the surrogate after a year without leave from the court in which the judgment was recovered.

Chapter 295 of the Laws of 1850 was then in force.

But however this may be, the clause of § 284 of the Code cited *supra*, was not then enacted.

Since its enactment there cannot, it seems, be any necessity for leave from the court in a case like this.

The motion is therefore denied.

N. Y. SUPERIOR COURT.

J. NELSON LUCKEY agt. THOMAS GANNON.

It is now well settled that an action can be maintained for the *conversion of a chose in action* which has been *pledged as security for a debt.*

An action to *redeem* is not the only remedy; and where the pledgee has wrongfully disposed of the pledged property, so as to put it out of his power to deliver it, or where upon *payment of the debt* for which it was pledged, and demand for its return, he refuses to return it, it is a *conversion* for which an action will lie.

The evidence in this case of the payment of the debt for which the insurance polices were pledged to the defendant and of the demand and refusal to return them to the plaintiff, was undisputed, leaving nothing for the jury to determine, and the direction to find for the plaintiff was correct.

General Term, January, 1869.

Action for the conversion of two policies of insurance.

The complaint alleged that in August, 1866, the plaintiff procured two polices of insurance—one from the State Insurance Company of Jersey City, and the other from the Security Insurance Company of Philadelphia—upon property consisting of a rosin oil factory in Brooklyn, and the machinery and other property therein, each for the amount of $625. That such policies provided that the loss, if any, should be payable to the defendant, to the extent of any indebtedness which, at the time thereof, should be owing to him *from the plaintiff.* The complaint further alleged, that at the time of the insurance, the defendant was in the employment of the plaintiff, and the loss was made payable to him, as security for any indebtedness of the plaintiff therefor; and that it was agreed that the policies should be returned to the plaintiff on demand, and on payment or tender of any amount which he should then owe the defendant; and that if at the time any loss should occur, nothing should be owing by the plaintiff to the defendant, then the policies should be delivered up to the plaintiff.

It was further alleged, that in January, 1867, the property covered by the polices was destroyed by fire; that in March following, the insurance companies adjusted the loss under each of the policies at $237.50, which sums the companies were willing to pay, upon production and cancellation of the policies. That *since* the loss and adjustment, the plaintiff has demanded the policies of the defendant, and offered to pay him any sum which might be found due him from the plaintiff, but the defendant refused. That although the plaintiff has offered to pay, &c., yet, that at the time of the loss, there was not, nor has there since been, anything due from the plaintiff to the defendant.

The answer of the defendant averred that the plaintiff was indebted to him, and has been since the time stated in the complaint, in a sum exceeding $475. That the plaintiff has not offered to pay any sum of money since the delivery of the policies. The defendant denied the conversion of the polices, and further alleged that the plaintiff was indebted to him in the sum of $1,300.

Upon the trial before a justice of this court, and a jury, the plaintiff testified *that at the time of the fire he did not owe the defendant anything, nor had he owed him anything since;* he once owed him about $250, *which he had paid him in full.* There was further evidence tending to show that the plaintiff was not indebted at the time of the fire, or since, to the defendant.

A general motion was made to dismiss the complaint without stating any ground therefor, which was denied.

The defendant testified to the sale of some worms to one Fisher, and the taking of his notes and of a chattel mortgage as security for the purchase-money; and gave other evidence tending to show that the loss under the insurance policies was made payable to the defendant as additional security for such notes. He was then asked: "Have you been paid your indebtedness arising out of this transaction?" And he answered "No;" and that there was still $1,300 due. That

neither before nor after the fire had he had any settlement with the plaintiff. That the plaintiff had neither paid nor *offered* to pay him anything.

All the evidence of an agreement by the plaintiff to pay the notes of Fisher was, on motion, stricken out by the court, and the defendant excepted.

There was other evidence that the defendant had not been paid. But it mostly referred to the non-payment of the Fisher notes, although some of the evidence left it uncertain which indebtedness was referred to.

At the close of the evidence, the court directed the jury to find a verdict for the plaintiff, and the defendant excepted.

A. J. PERRY, *for appellant, defendant.*
C. CONABLE, *for respondent, plaintiff.*

By the court, MONELL, J. The only issue in this case presented by the pleadings, was upon the nature and extent of the indebtedness for which the policies of insurance were intended as a security. The plaintiff claimed, and so alleged in his complaint, that at the time of the insurance, the defendant was in his employment, and that the loss was made payable to him, as expressed in the policies, in order to secure him for any indebtedness, that the plaintiff might owe him therefor, and for no other purpose whatever; and that it was then agreed, between the plaintiff and defendant, that such policies should be held by the defendant only for the purposes of such security, and should be returned to the plaintiff at any time when the plaintiff should demand the same, on payment or tender by the plaintiff of any amount he should then owe the defendant; and that if any loss should occur under the policies, and nothing should be owing by the plaintiff to the defendant, the policies should be delivered to the plaintiff, and all rights of the defendant released to the plaintiff.

These allegations, of the nature of the indebtedness intended to be secured, as well as the agreement between the parties in respect thereto, *was not denied in the answer*. The only allegations in the complaint negatived in the answer being those averring payment, or offer of payment, of the alleged indebtedness. So that the case, upon the pleadings, was narrowed to the single issue of payment or offer of payment of any indebtedness of the plaintiff to the defendant, growing out of the employment of the latter by the former. On the trial it was attempted to show, on the part of the defendant, that the insurance policies were intended to secure the payment of a certain chattel mortgage, given to the defendant by one Fisher, upon two copper worms, used in the distillation of rosin oil, to secure the payment of thirteen hundred dollars and upwards; and some evidence was furnished that the mortgage debt had not been paid. But the court, on motion, struck out all the evidence of an agreement on the part of the plaintiff to pay the debt of Fisher, probably on the ground that no such agreement had been set up in the answer; and also that the agreement set forth in the complaint was admitted by the answer.

I have examined the evidence furnished by the defendant, and cannot find any that is pertinent to the only issue presented by the pleadings. All the evidence relates to the non-payment of the debt due from Fisher, and was clearly inadmissible. As all evidence showing or tending to show that it was agreed or intended to secure the Fisher notes was excluded, it was immaterial, so far as the plaintiff's rights were concerned, whether such notes were paid or remained unpaid; and the evidence could not be made pertinent without an amendment of the answer.

Under this view of the case, there was nothing to go to the jury. The *debt* agreed to be secured by the transfer of the policies was admitted, and the evidence of the payment of *such* debt was not contradicted by the defendant, although he proved in general terms that the plaintiff had not paid

him. Yet it is so evident that he referred to the Fisher debt that it may safely be said that the plaintiff's evidence was undisputed. But were it otherwise, and the evidence on the subject of payment, or on the other subject, of partnership between the plaintiff and Fisher, was conflicting, the defendant should have called the attention of the court to it, by a request to submit such questions to the jury; and it is too late to raise the objection now, that the case should have gone to them upon any of the conflicting evidence in the case.

The only remaining question is, whether the plaintiff can maintain an action for the conversion of the policies, and that question was properly raised, I think, by the motion to dismiss the complaint.

The policies were taken in the name of the plaintiff, and contained a clause making the "loss, if any, payable to the defendant." Such words operated to give the defendant the same rights and interests in the policies which he would have had, if without such words, the policies had been assigned to him with the assent of the insurers (*Grosvenor* agt. *Atlantic Fire Insurance Co.*, 5 *Duer*, 517, *S. C.*, 17 *N. Y. R.*, 395; *Ennis* agt. *Harmony Fire Insurance Co.*, 3 *Bosw.*, 516). There cannot be a doubt that the assignee, before payment of the debt, could maintain an action upon the policies, for a loss to the subject insured. Before the Code an asssignee could not, in this state, have brought an action in his own name (*Jessel* agt. *Williamsburgh Ins. Co.*, 3 *Hill*, 88). It was otherwise in some of the states (*Motley* agt. *Manufacturers' Ins. Co.*, 29 *Maine*, 337), and is otherwise now in this state, the Code having provided that the action shall be in the name of the party in interest; and it has accordingly been held that the person to whom the loss is made payable, can sustain an action against the insurers (*Frink* agt. *Hampden Ins. Co.*, 45 *Barb.*, 384). It is equally clear, I think, that after payment of the debt, the right of the assignee to sue, if not gone entirely, could be taken from him by the

assignor, who upon discharging the debt is re-instated to all rights which he possessed before the assignment, not by subrogation, but by operation and force of the purpose of the assignment having been fully met and answered.

In the case of *Roberts* agt. *The Traders' Ins. Co.*, (17 *Wend.*, 531), the question was, whether after judgment in favor of an assignee against the insurers, and payment of the mortgage debt by the assignor, he was entitled to collect the judgment; and the court said, (*p.* 638) that the assignee took only a collateral interest in the policy, liable to be divested whenever the mortgage was paid, and that the payment of the mortgage had the effect to bring back to the mortgagor and assignor of the policy the interest which he had assigned, and of course the interest in the judgment which had been obtained upon the policies.

The cases cited, establish that upon payment of the debt, the assignor is restored to his interests, and may maintain an action upon the policies, or to compel a reassignment to himself, if that be necessary for the purpose of bringing suit.

That an action can be maintained for the conversion of a chose in action which has been pledged as a security for a debt, is now well settled (*Campell* agt. *Parker*, 9 *Bosw.*, 322; *Decker* agt. *Matthews*, 12 *N. Y. R.*, 313). An action to redeem is not the only remedy; and where the pledgee has wrongfully disposed of the pledged property, so as to put it out of his power to deliver it, or where, upon payment of the debt for which it was pleged and demand for its return, he refuses to return it, is a conversion for which an action will lie.

The evidence in this case of the payment of the debt for which the insurance policies were pleged, and of the demand and refusal to return them to the plaintiff, was undisputed, leaving, therefore, nothing for the jury.

The direction to find for the plaintiff was correct, and the judgment should be affirmed.

JONES and FITHIAN, JJ., concurred.

ONEIDA COUNTY COURT.

GEORGE BAXTER and others, respondents agt. ZARY J. PUTNEY, appellant.

The constitutional right of *trial by jury*, secured to persons in actions of *replevin*, remain to them in actions under the Code for the *possession of personal property*.

Prior to the constitution of 1846, *replevin* was one of the causes of action of which a *justice of the peace had no jurisdiction*.

In 1860, under the Code, the legislature conferred such jurisdiction on justices of the peace in actions where the value of the property claimed did not exceed $100.

Juries in courts of record, prior to the constitution of 1846, were composed of *twelve men*, and so have remained to the present time; and the word "jury," as used in art. 1, sec. 2, of the constitution, means a common law jury of twelve men.

When, therefore, a plaintiff brings an action of replevin or for the possession of personal property, under the Code, in a justices' court, if the defendant demands a jury trial by *twelve men*, the justice must dismiss the action, as he has no jurisdiction to summon a juty of only six men.

December Term, 1868,

ON the 29th day of July, 1868, George Baxter and others brought suit against Zary J. Putney, in a justice's court, to recover possession of a quantity of stair bolts, and for damages for the detention of the same.

The action was brought pursuant to subdivision 10, of sec. 53 of the Code. The plaintiffs gave the required undertaking and the constable took possession of the property.

On the return day of the summons, the parties appeared before the justice; the defendant for answer denied the complaint, and demanded that the cause be tried by a jury of twelve men, which the justice refused to empannel, whereupon, the defendant left the court-room, and the plaintiff proceeded to trial before the justice, without a jury. The only evidence of damage, was that of Henry Baxter, as follows: "The damage to the plaintiffs for removing those bolts out of their possession, is ten dollars."

Plaintiffs recovered a judgment for the possession of the property, together with $10 damages, and $4.60 costs, from which the defendant appeals to this court.

H. R. HADLEY, *for appellant.*
H. W. BENTLEY, *for respondents.*

JOEL WILLARD, County Judge. In justices' courts, the defendant failing to appear, the plaintiff cannot take judgment by default, he must prove his case and this must be by competent and legal evidence. (*Code sec.* 64, *subdivision* 8; *Jones* agt. *Pridham*, 3 *E. D. Smith*, 155; *Perkins* agt. *Stebbins*, 29 *Barb.*, 523; *Armstrong* agt. *Smith*, 44 *id.*, 128.)

It is difficult to determine on what principle the witness arrived at the amount of damages sustained by plaintiffs; the only evidence on that point, being that of Henry Baxter, as follows: "The damage to the plaintiffs for removing these bolts out of their possession is ten dollars."

Under the rules of evidence as laid down by all elementary writers, and as established by the universal practice of the courts, this would hardly be considered sufficient to prove the measure of damages in cases of this kind.

But the most important question involved in this case, and perhaps, the one most difficult of solution, is in reference to the authority of the justice to try the cause after a demand had been duly made on the part of the defendant for a trial by a jury of twelve men, embracing as it does the constitutional right of litigants to trial by jury.

There can be no dispute, I think, that a justice of the peace has no authority to empannel a jury of twelve men for the trial of a cause. Juries in justices' courts are limited to six men. (3 *R. S.*, 5 *ed.*, *p.* 441; 2 *Waite's Law and Pr. p.* 593).

In *Dater* agt. *Loomis*, (*General Term decision in the 5th district, not reported*). MULLIN, J., says: "There is no doubt as to the power of the legislature to enlarge the jurisdiction

of justices of the peace to any amount it may deem proper. These courts will have full power to hear, try and determine all such cases, unless either of the parties shall demand a trial by jury. That done, it may not be in the power of the court to proceed, as it cannot empannel a jury of twelve men. But until that objection is taken, the court may proceed and its judgment will be unquestionably valid."

Then had the defendant a right to a trial by a jury of twelve men? If so, the justice should have entered a judgment of discontinuance of the action, and left the plaintiffs to prosecute their claim before another tribunal.

SELDEN, J., in *Greason* agt. *Keteltas*, (17 *N. Y.*, 491) says: "The right of trial by jury in a proper case, is absolute, and any decision of the court overruling or denying such right, would be plainly erroneous, but it is a right which can be waived, and if a party who is entitled to it, enter voluntarily upon a trial by the court without objection, he would ordinarily no doubt, be understood as consenting to that mode of trial."

In *Dater* agt. *Loomis* (*supra*) the court says: "The right of trial by jury, secured by the constitution, applies as well to civil as to criminal cases, and as the court of appeals have held in *Wynehamer* agt. *The People*, 13 *N. Y.*, 378) that the jury intended by the clause of the constitution referred to, was a jury composed of twelve men; the same number must form the jury in civil cases."

It is claimed on the part of the appellant that this is one of the cases coming within sec. 2, of art. 1 of the constitution, which provides:

"That trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

The word "cases" in the the section of the constitution referred to is to be deemed synonomous with "causes." (*Beecher* agt. *Allen*, 5 *Barb.*, 173; *Benson* agt. *Cromwell*, 26 *id.*, 218; *Kundolf* agt. *Thalheimer*, 12 *N. Y.*, 426).

In all cases which it has heretofore been used is generic, it implies a class of cases, (*Fire Department* agt. *Harrison*, 17 *How.*, 277; *Wynehamer* agt. *People*, 13 *N. Y.*, 426.).

Actions for the delivery of personal property under the Code are a substitute for the actions of replevin under the old practice, and are the same in nature if not in name. (*Roberts* agt. *Randall*, 5 *How.*, 327; *Rockwell* agt. *Saunders*, 19 *Barb.*, 481; *Nichols* agt. *Michael*, 23 *N. Y.*, 269). And the constitutional right of trial by jury, secured to persons in actions of replevin, remain to them in actions under the Code for the possession of personal property.

Prior to the constitution of 1846, replevin was one of the causes of action, of which a justice of the peace had no jurisdiction, but were only cognizable by courts of record. And so it remained in reference to such actions under the Code, down to 1860, when the legislature conferred such jurisdiction in actions where the value of the property claimed did not exceed $100.

Juries in courts of record prior to the adoption of the constitution of 1846, were composed of twelve men, and so have remained to the present time, and the word jury, as used in art. 1, sec. 2, means a common law jury of twelve men. (13 *N. Y.*, 427 *and* 458; 12 *id.*, 190; 1 *Bouv., Law Dic.*, 747; 18 *Barb.*, 451; 2 *Parker, C. R.*, 312.)

This being one of the cases wherein a party was entitled to a trial by a jury, prior to the constitution of 1846, the same right remained thereafter by virtue of art. 1, sec. 2, in the same manner as it had theretofore existed and it was incompetent for the legislature to deprive a party of such right. But I do not understand that such was the intention, and it is certainly not the letter of the law of 1860; for nowhere does it deny the right of a party to a trial by a jury of twelve men. Nor does it limit the trial of such cases to justices' courts, it simply leaves the parties to elect to waive their constitutional right, and try in a justices' court, or to demand a trial in a court of record, where a jury of twelve

men could be obtained; and a plaintiff in bringing such an action in a justices' court, does it at the risk of having it dismissed upon motion of defendant for such a jury.

I am of opinion that the justice erred in refusing to discontinue the suit upon motion of defendant, and for that reason the judgment should be reversed, and it is so ordered.

N. Y. SUPERIOR COURT.

JEAN TOULANDOU agt. AUGUSTUS LACHENMEYER.

The *statute of limitations* of another state, in which the cause of action arises, is not available as a defense in this state. If six years have not elapsed since the statute of this state began to run the right of action is not barred.

If the statute of limitations was admissible as evidence of a defense here, it could not be proved by *parol*.

General Term, January, 1869.

Action for money lent and advanced, and goods sold and delivered in the city of New Orleans, state of Louisiana, during the years 1858, 1859 and 1861.

Defense, statute of limitations of the state of Louisiana.

On the trial, a witness for the defendant testified that he was a practicing lawyer in New Orleans, and acquainted with the laws of Louisiana. He was then asked the following question: "What is the law of Louisiana with regard to prescription or limitation of actions for goods sold and delivered and money loaned?

The question was objected to, and excluded by the court, and the defendant excepted.

The plaintiff had a verdict, and the defendant appealed, and also from an order made at special term denying a motion for a new trial.

LAUTERBACH & SPINGARN, *for appellant, defendant.*
H. MORRISON, *for respondent, plaintiff.*

By the court, MONELL, J. The statute of the state of Louisiana, in which state the cause of action in this case arose, limiting the time for bringing actions, is not available as a defense, in the courts of this state (*Ruggles* agt. *Keeler*, 3 *John. R.*, 263). It is therefore immaterial, that by the laws

of that state, the right of action would be lost. If six years have not elapsed since the statute of our own state began to run, the right of action is not barred.

The evidence offered of the Louisiana statute was therefore properly excluded.

The manner of proving such statute was also objectionable. The defense was the "*statute* of limitations" and, although the question which was overruled admitted of an swer, proving the existence in that state of some common law bar, recognized by the courts of that state, yet, under the answer, the *statute* was the only bar which could properly be proved; and the attempt was to prove such statute by *parol*. That probably could not be done. Until a recent period, such laws could be proved in our courts *only* by a copy properly exemplified by the officer having the custody of them—at least such seems to be the current authority (*Packard* agt. *Hill*, 2 *Wend.*, 411; *Thomas* agt. *Robinson*, 3 *id.*, 267).

In 1848, a statute was passed in this state, allowing the printed volumes of the statute laws of any other of the United States, to be admitted in our courts as *prima facie* evidence of such laws (*Sess. Laws*, 1848, *chap.*, 312).

The question was therefore properly overruled, and judgment should be affirmed.

JONES and FITHIAN, JJ., concurred.

SUPREME COURT.

ELIZA H. DISBRO agt. SANFORD DISBRO and others.

This court hat the power at general or special term, to *revive and continue an injunction* in its discretion, in all proper cases, and upon such terms as to security and otherwise as it may deem just. But it should be upon the giving of a *new undertaking* in the same manner as upon the granting of the original injunction.

In this case a motion on the part of the plaintiff is granted reiviving the injunction and stay of proceedings, pending an appeal to the general term, from a judgment on the report of a referee *dismissing the complaint*, on the plaintiff's giving a new undertaking in proper form, &c.

Monroe General Term, March, 1869.

Present. E. D. SMITH, JOHNSON *and* DWIGHT, *Justices.*

MOTION by plaintiff for revival of injunction and stay of proceedings pending an appeal to the general term from judgment on the report of a referee dismissing the complaint.

The motion was first partially heard at special term on the Saturday before the sitting of the general term, but not being decided was renewed at the general term as upon an appeal, by direction of the judge holding the special term.

The action was brought to reach a bond of the county of Monroe for $10,000, and restraining its transfer, which was in the possession of the defendants, the Bank of Monroe, which held it for the defendant Garcia, who had purchased it of the defendant Sanford Disbro, who claims title to it as well as the plaintiff.

The plaintiff asserted in her complaint that possession of it had been fraudulently obtained from the bank where it had been deposited for safe-keeping by her husband acting for her, and since deceased, and had been clandestinely sent to New York for sale by said Sanford, and that the said Garcia, who claimed to have purchased it of the said Sanford, was not a *bona fide* purchaser.

The action had been tried before a referee who found against the plaintiff and dismissed the complaint. From this judgment the plaintiff had duly appealed to the general term, and given the undertaking in the sum of $500 required by section 334 of the Code, and the plaintiff now applied for a stay of proceedings on such judgment, and a revival and continuance of the injunction upon such terms as the court might prescribe.

The application was opposed by the defendants Garcia and Sanford Disbro.

G. F. DANFORTH and H. C. IVES, *for plaintiff.*
GEO. G. MUNGER, *for defendant Garcia.*
G. W. MILLER, *for defendant Disbro.*

By the court. E. DARWIN SMITH, J. It is not disputed that the appeal is brought in good faith. We are not asked to deny the plaintiff's application for a stay of proceedings on the judgment, including a revival of the injunction, on the ground that the appeal is frivolous or is brought or prosecuted without probable cause.

A dismissal of the complaint undoubtedly dissolved the injunction and the appeal does not revive it. Nor will an undertaking upon the appeal sufficient to stay proceedings on the judgment operate to continue the injunction. It would merely stay proceedings to collect the defendants' costs recovered by the judgment. The application is therefore in the nature of a new application for an injunction pending the appeal.

If the judgment had been in favor of the plaintiff requiring the county bond to be given up to her, the defendant on appeal might have stayed all proceedings under the judgment as a matter of right by complying with the provisions of section 336 of the Code. But the complaint being dismissed the bond is left in the possession of the bank of Monroe and may be given up by it to the defendant Garcia, and by him

used, transferred or put into circulation at his pleasure like other negotiable paper, and the plaintiff's rights in respect to it and the whole object of the suit may be thereby entirely defeated by the simple acts of the defendants.

In this view the plaintiffs appeal might be and probably would be entirely abortive, though the court should ultimately decide in her favor; and it obviously will be quite useless for her to further prosecute it unless this court revive and continue the injunction as incident to the stay of proceedings upon the judgment pending such appeal. As it is quite clear that the Code makes no provision for such stay unless such provision is embraced in section 348, which authorizes the court or a judge to stay proceedings in certain cases upon such terms as to security and otherwise as may be just.

But this court has the unquestionable power to revive and continue such injunction as an original power. It was said by the vice-chancellor, where the appeal was from a vice-chancellor to the chancellor, in *Coster* agt. *Griswold* (4 *Edwards*, 374), that "the application should be made to the chancellor who alone had control of the appellate proceedings." It was in view of this suggestion, chiefly, that I directed that this application be made to the court at general term as the appellate court. But in the case of *Hart* agt. *The Mayor of Albany*, (3 *Paige*, 214), the suit was before the chancellor, and he dissolved the injunction upon motion after answer, on the ground that the plaintiffs had a perfect remedy at law, and were not entitled to an injunction until they had established their right at law; and on a subsequent application he revived and continued it till an appeal taken from such decision could be heard in the court for the correction of errors (*same case at p.* 386), and expressed no doubt of his power to do so, notwithstanding the appeal.

The bill in this case was filed to restrain the defendants and their dock master from removing from the Albany basin an ark or floating store house, which the complainants had

erected and moved therein contrary to an ordinance of the corporation. If, after the dissolution of the injunction, the city authorities had proceeded as they were proposing to do, to carry the ordinance into effect by destroying or removing from the basin, the ark or store house, the plaintiffs would not have been remediless if the appeal had been ultimately decided in their favor, for the city of Albany was able to respond in damages for the full value of the property destroyed, and all other injury sustained by the complainants in consequence of such destruction.

But notwithstanding the complainants had this security for their indemnity in case the defendants wrongfully destroyed the store house pending the appeal, the chancellor revived and continued the injunction to enable the complainants to bring the appeal to a hearing before the destruction of such store house.

This case was decided in July, 1832. At this time it was not the practice, except in the few cases prescribed in the Revised Statutes, when the injunction stayed the trial of a personal action at law, or proceedings after verdict or judgment, to require security on the granting of an injunction. In the revision of the rules of the court of chancery, made by chancellor WALWORTH in 1829, provision was made by rule 31 giving power to the officer authorized to allow injunctions in his discretion, to require of the complainant or his agent a bond with security or his own bond only, to the party enjoined in such sum as he might deem reasonable, conditioned to pay to such party all damages he might sustain by reason of said injunction.

This rule remained so till after the revision of the rules in 1837, when it was amended as it appears in the revision of 1844, making it imperative upon the officer allowing an injunction, in every case to take such bond in a sum not less than $500.

I presume, therefore, that no security was given on the granting of the original injunction in this case of *Hart* agt.

The City of Albany, and the chancellor required none in the order reviving it, so far as we can see from the reported case. The fact that security was not required or given on granting injunctions in chancery before this period, is probably the chief reason why the chancellor speaks in so hesitating or dubious a way in respect to the granting of such applications. And the same reason I think must have operated with many of the equity judges in England in respect to such applications in holding that they are not to be favored, while they generaly granted them on some terms in all proper cases or when they could see that the appellant could not in case of success be set right again or would lose the benefit of his appeal. (*Eden on Injunctions*, 375; 17 *Vesey*, 382; 15 *id.*, 182.

This provision of rule 31 of the court of chancery has been carried into the Code, and section 22 now requires security in all cases where no other provision of law is made in respect to security in such cases. This provision I think obviates in a large degree most of the objections, doubts and hesitancy that had heretofore existed in the courts of equity on this subject. The judges have uniformly sought to favor the right of review in fair cases according to the spirit of the statute giving the right of appeal, and no reputable judge has ever sought to prevent or hinder such review by the superior court of a decision of an inferior court or judicial officer affecting important rights, by refusing to make such orders as were essential to make the right of review real and effectual in case of error in the subordinate court.

In the case of the *Town of Guilford* agt. *Cornell*, (4 *Abb.*) the general term in the sixth district, while they dissolved an injunction granted and sustained at special term on motion, after an appeal to the court of appeals, made an order continuing the said injunction until the decision in the court of appeals, and this without any new security upon the injunction.

We have no doubt of the power of this court at general or special term to revive and continue an injunction in its discretion, in all proper cases, and upon such terms as to security and other wise as it may deem just. But it should obviously be upon the giving of a new undertaking upon the revival of the injunction in the same manner as upon the granting of an original injunction. And we have no doubt that this is a proper case for the exercise of such power. The plaintiff will confessedly be remediless in case the injunction is not revived and continued till the hearing of the appeal, provided the court should reverse the judgment below. The appellant in such case should be required to proceed with all due diligence in getting the appeal in readiness for a hearing at the general term. The motion is therefore granted, and the injunction revived and continued till the hearing on the plaintiff's giving a new undertaking in proper form, with one or more sureties to pay to the defendants all damages sustained by the injunction, not exceeding $1,500.

N. Y. SUPERIOR COURT.

WILLIAM W. LOWRY and ROBERT J. LOWRY agt. WILLIAM H. INMAN.

Where an *act of the legislature of another state incorporating a bank* therein, provides that without any action against a stockholder thereof, his private property shall be bound by a judgment against the bank, and subject to execution upon such judgment, it imposes no *personal liability* whatever upon the stockholder which can be made the ground of an action against him here or elsewhere.

Such a provision in the charter is a mere regulation of the *remedy* and has no force or effect beyond the limits of that state, and the remedy being exclusive, the stockholder cannot be pursued in this state in a form and by an action different from that provided in the charter, even though it imposed a personal liability upon him.

Special Term, June, 1869.

THIS action is founded on a statute of the state of Georgia, and is brought by the plaintiff as creditor of "The North-Western Bank of Georgia," to enforce against the defendant, as a stockholder of the bank, an alleged liability for the debts of the bank, claimed to be imposed upon him by the following section of the act of incorporation.

"Section 18.—And be it further enacted by the authority aforesaid, that no one shall subscribe for, or own or purchase stock in said bank unless he or she be a citizen of Georgia, and one third of said stock shall be subscribed for by citizens of Georgia. The private or individual property of each stockholder, as well as their joint property, shall be liable for the redemption of the bills of said bank, and for the payment of all the debts and liabilities of the same, and when any judgment shall be obtained against said bank, and execution issued thereon, it shall be the duty of the levying officer, first to levy the same on the property of said incorporation, and to sell the same, and if the proceeds thereof shall be insufficient to pay off said execution, and the return

of said officer of no corporate property, shall be sufficient proof of the same, it shall be the duty of said officer next to levy said execution on the individual property of any stock holder or stockholders, and sell the same until an amount is raised sufficient to pay off said execution; provided the same is not for a greater amount than the value of the stock of the stockholder whose property is levied upon, and if for a greater amount, in that case an amount equal to the amount of his stock. And judgment obtained against said bank by any creditor shall not only bind the property of said bank, but shall also bind the individual property of each stock holder to the amount of his stock, without the necessity of bringing any suit against the stockholders, and service of a copy in substance of the declaration and process upon the president or cashier of said bank shall be adjudged sufficient service and notice, both to said bank and each stockholder therein, to render the property of said bank and the individual property of each stockholder therein subject and liable for the payment of any judgment which may be rendered against said bank; each stockholder to be liable in proportion to the amount of his stock for the entire indebtedness of said bank; and any stockholder who pays off any such execution, or part thereof, shall have the right to use and control the same *fi. fa.* against all the other stockholders, so as to collect the rateable share of each of them."

Plaintiff contends that this section of the statute incorporated in the charter, enables him as creditor of the bank, to follow defendant here and hold him responsible, individually, under our laws; defendant, on the contrary, insisting that it only gives plaintiff a remedy against his, defendant's property found within the jurisdiction of Georgia, and that there, such remedy ends.

The defendant accordingly demurs to the complaint for insufficiency in substance, and the single question to be determined is, whether the foregoing section of the charter of

the bank creates a liability which will support an action in the courts of this state.

BARLOW and HYATT, *for plaintiffs.*
ROGER A. PRYOR, *for defendant.*

MCCUNN, J. Notwithstanding the doubt suggested in *Whitford* agt. *Panama Railroad Company*, (23 *N. Y.*, 465); *and in Patterson* agt. *Baker*, (50 *Barb.*, 432); *and the positive dictum in Bullard* agt. *Bell*, (1 *Mason*, 243); *Bank of the United States* agt. *Dallam*, (4 *Dana*, 574); *Lane* agt. *Morris*, (10 *Georgia*, 164), *and Thornton* agt. *Lane*, (11 *Georgia*, 497); notwithstanding the adverse opinions of these very respectable authorities, I shall assume, on the precedent of *ex parte, Van Riper*, (20 *Wend.*, 616), that a statutory liability, created by the positive law of a state, is not necessarily restricted in its operation to the territory of that state; but partaking of the nature of a contract, is efficacious everywhere, if valid, according to the *lex loci contractus*, and may be asserted and enforced in any tribunal, to the jurisdiction of which the defendant may be amenable.

But, laying this difficulty out of the case, I am unable to understand, after the most attentive examination, that the above recited section imposes any *personal* liability whatever on the defendant. On the contrary, it is manifest, as well from the express provisions as from the general scope of the section, that its effect is merely to bind the *property* of the defendant, so as to subject it to execution on a judgment against the bank. And this construction, which would obviously result from the phraseology of the section, even in the absence of any negative clause, is confirmed by the provision, that the property of the stockholder may be taken under execution against the bank *without the necessity of an action against him.* We are not to assume that these words are a needless and nugatory pleonasm; we are to accept them in some sense; and if they mean anything, they are

intended to preclude the inference of a liability on the part of the stockholder to a personal action at suit of a creditor of the corporation.

No doubt the qualification was inserted for the benefit of the creditor, that he might be secured a more expeditious remedy than by action against the individual stockholder; but with its object we have no concern, while its effect is to obviate an action against the defendant.

The section, so far as it subjects the stockholder to any responsibility for the corporate debts, as well as in other important particulars, is manifestly in derogation of the common law; and by all authorities must be restrained in its operation by a strict construction (1 *Parsons on Contracts*, 143). Hence, whatever may be our speculative opinion as to the policy of the legislature in enacting the section, we are not at liberty to extend its effect beyond its literal terms, by enlarging and aggravating the liability of the stockholder; and if besides the lien imposed upon the property of the stockholder by the provisions of the section, we should so interpret it as to charge him with a personal liability, we would subject him to a burden from which, under the words of the charter, he is clearly exempt. Nor because under certain conceivable circumstances the remedy of the creditor would be illusory in the absence of a right of action against the stockholder, is it incumbent upon the courts of this state to supplement and reinforce the defective legislation of a foreign government.

The argument of inconvenience should be addressed to the legislature of Georgia, to induce an amendment of the statute, and is of no relevancy or weight with a court whose duty is simply to declare its legitimate construction (*Broom's Comm., p.* 5).

In my view, the legal construction of the section in controversy is, that it does not impose on the defendant a liability which may be made the ground of an action *in personam* against him; but that it only charges and binds his property

so as to subject it to execution in satisfaction of a judgment against the bank. The only effect of the statute, is to *bind the property* of the individual corporator, and to bind it *sub modo* only, *i. e.* by subjecting it to levy on an execution against the corporation. Surely, it is beyond the competency of this court to expand so narrow and restricted a liability into an absolute personal responsibity for the debts of the bank, which may be enforced any and every where by action *in personam* against the defendant. If it had been the design of the legislature of Georgia to charge the person as well as the property of the stockholder, they would have so provided; whereas, on the contrary, they have carefully restricted his liability to the hazard of an execution against his property, and have in terms negatived a right to redress against him by personal action.

It is evident that no action against the defendant could be founded on this statute in the courts of Georgia; and *a fortiori* he cannot be pursued personally in the tribunals of this state.

The distinction between a personal liability capable of enforcement by action *in personam*, and a mere right of recourse against property which can be realized only by a proceeding *in rem*, is too obvious and familiar to require illustration. If any authority were needed to establish that the latter liability is insufficient to support an action, it might be found in *Melan* agt. *Duke of Fitz James*, (1 *Bos. and Pul.*, (38).

Contemplating the section under review in all its parts and provisions, I see very plainly that it is nothing else than a mode of execution prescribed by the legislature of Georgia. In its terms, the section imports no other or larger operation. Assuming a judgment already rendered against the bank at suit of a corporate creditor, it proceeds to designate in what manner and by what means that judgment shall be satisfied. And it is extremely material to observe, that in prescribing the mode of satisfaction, the phraseology of the

section is couched, not as a concession of right to the creditor, but in the style of mandate to the sheriff, "it shall be the duty," &c. In a word, by the statute, the legislature of Georgia provided a remedy only, and imposed on its own ministerial officer, the duty of enforcing the remedy. Now such a statute is of no recognition or effect beyond the territory of the state enacting it, and any right or obligation it may seem to imply, cannot be made the basis of action in a foreign tribunal. As a lien upon property, it is inoperative beyond the jurisdiction of the court. (*Story on Conf. of Laws, sections*, 539, 546, 547; *Dewitt* agt. *Barrett*, 3 *Barb.*, 84). It relates exclusively *ad litis ordinationem*, and outside the territory of Georgia is a mere nullity.

(*Wheaton, Inter. Law*, 139; *Story on the Confl. of Laws, section* 556; 2 *Kent's Comm.*, 559, *Edition* 1866; *Broom's Comm.*, 45, 46; *Westlake, Private Inter. Law, Art.* 468; *also Art.* 166; *Watrics* agt. *Pierce*, 32 *N. H.*, 582; *Titus* agt. *Hobart*, 5 *Mason*, 379; *Pickering* agt. *Fisk*, 6 *Verm.*, 102; *Donn* agt. *Lippman*, 5 *Cl. and Finn.*, 11.)

But apart from all this, and even though it be conceded to the plaintiffs, that the section in dispute does impose a liability on the defendant, which, under circumstances, might found an action *in personam* against him, there still remains an insuperable bar to their recovery in this action and in this tribunal.

It is an ancient and incontrovertible principle of the common law, that when a statute creates a right, and at the same time provides a remedy for the vindication of that right, the party seeking to enforce the right is restricted to the statutory remedy, and has no other redress. Chancellor WALWORTH, thus propounds the rule in *Renwick* agt. *Morris*, (7 *Hill.*, 575:) "When a new right is given by the statute, and a remedy given for the violation of it, the party is confined to this remedy." So Mr. Justice BRONSON, in *Stafford* agt. *Ingersoll*, (3 *Hill.*, 40) says: "If a statute create a right which did not exist before, and prescribes a remedy for

the violation of it, that remedy must be pursued. And Chief Justice SAVAGE, *in McKeon* agt. *Caferty*, (3 *Wend.*, 495: "Without the aid of the statute no action at all would lie; the statute remedy must therefore be pursued." Lord TENTERDEN, in *Rochester* agt. *Bridges*, (1 *B. and Adol.*, 847): "When an act creates an obligation and enforces the performance in a particular manner, we take it to be a general rule, that performance cannot be enforced in any other manner." Lord CAMPBELL, C. J., in *Couch* agt. *Steele*, 3 *El., and Bl.*, 44): "In the present case, if the statute had prescribed a particular mode of recovery, undoubtedly that mode of recovery only could be adopted." To the same effect are the following cases: (*Dudley* agt. *Mahew*, 3 *N. Y.*, 9; *Hardmann* agt. *Brown*, 39 *N. Y.*, 196; *Smith* agt. *Lockwood*, 13 *Barb.*, 209; *The Eastern Arch, Co.*, agt. *The Queen*, 2 *El., and Bl.*; *The People* agt. *Hazard*, 4 *Hill.*, 209; *Alvey* agt. *Harriss*, 5 *John.*, 175; *Calkins* agt. *Baldwin*, 4 *Johns.*, 667; *Comyn's Digest, action on statute, C.*; *Smith on Stat. and Cons. Construction, sections* 661, 666, 667; *Dwarris on Stat.* 697).

The application of the rule thus expounded and illustrated, is decisive against the present action. It appears in the complaint, that the North-Western Bank of Georgia is a corporation. At common law, and independently of any statute provision, the defendant, as a stockholder, is not liable, in his private capacity, for the debts of the corporation. "Incorporated companies," says Chancellor KENT, "though constituted expressly for the purposes of trade, are not partnerships within the presumption of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company. To render them personally liable, requires an express provision in the act of incorporation." (3 *Comm.*, 26; *An. and Am. on Corporations*, 38, *and n.* 597, 602, *and n.* 613; 1 *Parsons on Cont.*, 143; *Gray* agt. *Coffin*, 9 *Cush.*, 199;

Whitman agt. *Cox*, 13 *Shepley*, 338; *Guskill* agt. *Dudley*, *Metc.*, 551; *Erickson* agt. *Nesmith*, 4 *Allen*, 223 *S. C.*, 15 *Gray*; *Winter* agt. *Baker*, 50 *Barb.*).

Whatever right of recourse may exist against the defendant personally for the debts of the bank, is created by the section of the charter recited in the complaint.

But the same section, at the same time, prescribes a particular remedy for asserting the right.

The statute that imposes the liability provides a specific method of enforcing it. The right and the remedy are created together, and are inseparable; and the creditor can realize his right in no other way than as prescribed by the statute; but the present action is not the form of remedy provided by the statute; and indeed from its nature, that remedy is incapable of enforcement or execution beyond the territory of the state of Georgia. And this evidently was the intention of the legislature of Georgia, since they provided in the charter that none but citizens of Georgia should subscribe for, or own stock in the bank. (*Erickson* agt. *Nesmith*, (15 *Gray*, 221); *S. C.*, (4 *Allen*, 233), and *Summer* agt. *Marcy*, (2 *W. and M.*, 106), are explicitly in point. *Halsey* agt. *McLean*, (12 *Allen*, 438); *Drinkwater* agt. *Portland Marine Co.*, (18 *Maine.*, 35), and *Winter* agt. *Baker*, (50 *Barb.*, 432), if not direct authorities, yet establish and illustrate the principle on which this decision hinges.

The alternative and subordinate ground, on which in argument, the plaintiffs counsel attempted to substantiate the action, *i. e.* that the notice on the bank bill, to the effect "that the property of the stockholders was liable to the holders of said bills," is clearly untenable. In the first place the notice on the back of the bills, purports, in terms, to bind only the property of stockholders, and conveys no intimation of a personal responsibity. Indeed, the notice strongly corroborates that construction of the charter which excludes the inference of a right of action against the defendant.

In the second place, the notice emanates from the corporation; and the defendant, as cashier, is not chargeable with the acts and declarations of his principal.

And, finally, the indorsement on the bills has reference to the liability created and defined by the charter of the bank, of which the billholder was presumed cognizant, and cannot be construed as involving any greater liability than as is imposed by the charter or assumed by the terms of the indorsement.

On these grounds the demurrer is sustained, and judgment must be entered for the defendant, with costs.

SUPREME COURT.

JESSE N. BOLLES, Receiver, &c., agt. JOHN A. DUFF, Receiver, &c.

Where an individual is declared by the court to be a *mortgagee in possession* of mortgaged premises, and in effect to be a *trustee of the equity of redemption* of such premises, and is subsequently appointed *receiver* of the same property, his claims and interests, individually, must not be permitted to interfere with his duties as receiver, or with the purposes or interests for which he was appointed.

In this case, *held*, that it was the duty of the defendant *as receiver*, to increase the surplus beyond what should be found due him as mortgagee, by getting as large a rental as he reasonably could for the trust property, (the Olympic Theatre in the city of New York).

That the circumstances under which the order appealed from was made, authorizing the defendant, as receiver, to lease the premises to the lessee therein named, show that it was highly probable that the defendant did not make his application to the court with the good faith and impartial and disinterested purpose called for by his office or position of receiver; and such circumstances also show that the court should have carefully scrutinized the application and that the order should not have been made without further inquiry, by a reference or otherwise, as to the situation and value of the property, and the propriety of making the order.

Held also, that the order appealed from, was inadvertently made, without sufficient consideration being given to the circumstances, and that the application for it was made by the receiver with a motive or purpose, inconsistent with his duty and position as receiver. The order *reversed* with the privilege to the present lessee to hold the premises for one year from the date of his lease.

First Judicial District, General Term, January, 1869.

Before CLERKE P. J. BARNARD *and* SUTHERLAND, *JJ.*

APPEAL from an order made at special term, by Judge BARNARD, on the third day of August, 1868, authorizing defendant Duff, as receiver, to lease the premises known as the Olympic Theatre, in the city of New York, to James E. Hayes, for the term of three years, from the 1st day of September, 1868.

B. C. THAYER, *for plaintiff, appellant.*

A. OAKEY HALL, *for defendant, respondent.*

By the court, SUTHERLAND, J. Preliminarily to the argument of this appeal, the majority of the court decided that

the papers handed or sent to the judge, who made the order appealed from, upon due notice to the attorney for the defendant, after the argument and submission of the motion, had been properly printed as a part of the appeal papers, were to be considered by the general term, in determining the questions presented by the appeal.

As to these papers, the majority of the general term substantially held, if the learned judge who made the order appealed from, did not consider them in making the order, as it appears from his opinion he did not, he ought, considering the nature of the order asked for, and the circumstances under which it was made, to have done so.

The decree of Judge POTTER, declared the defendant Duff to be a mortgagee in possession, but it also, substantially or in effect, declared him to be a trustee of the equity of redemption; and he being such mortgagee and trustee, the court appointed him receiver also.

By accepting the office or position of receiver, he must be deemed to have assumed the duties and responsibilities of a receiver unqualified or unmodified by the fact or circumstances, that he had been declared to be a mortgagee in possession, or by the fact or circumstances, that he claimed the decree to be erroneous, and that he was, and finally might be held, to be the absolute owner.

His relations, claims and interests as to the property, might have been, and probably was, urged against the fitness of his appointment as receiver, but having been appointed, and having accepted such relations, his claim and interest must not be permitted to interfere with his duties as receiver, or with the purpose or interests for which he was appointed.

He was declared a trustee, and appointed a receiver, upon the theory that he was sure to receive the amount found due him as mortgagee as the result of the accounting, and that there would and might be a surplus for distribution among the creditors of John M. Trimble. The duties and

position of the defendant relative to the trust property, must for the purpose of this appeal be considered as fixed by the decree of Judge POTTER, and by the defendants acceptance of the office or position of receiver.

His duty as reciver clearly was, to increase the surplus beyond what should be found due him as mortgagee, by getting as large a rental as he reasonably could for the trust property; and on his application to the court as receiver, for authority to have it leased, it was his duty to lay before the court all the information he had, or could with reasonable diligence have acquired as to the situation and value of the trust property.

In my opinion, the circumstances under which the order appealed from, was made show that it was highly probable that the defendant did not make his application to the court with the good faith and impartial and disinterested purpose, called for by his office or position of receiver, and these circumstances also, in my opinion show, that the court should have carefully scrutinized the application, and that the order should not have been made without further inquiry, by a reference or otherwise, as to situation and value of the property, and the propriety of making the order.

I will refer to some of these circumstances as shown by the papers,

1st. The application was for authority to lease to Hayes, the son-in-law of the receiver, and not an application for authority to lease to whoever might be found willing to take a lease upon terms and conditions most advantageous for the trust estate, or those whose interests were represented by the receiver.

2d. The provisions in the order of Judge SMITH, restraining the receiver from making any new lease to Hayes, or extending or renewing the lease to him, without the special leave of the court, granted on due notice to the plaintiff's attorney, should have led the court to carefully scrutinize the motive or purpose of the application, which

was virtually an application to renew or extend a lease to Hayes, and should have led to further inquiry, as to the condition and value of the trust property, and the propriety of making the order before making it.

3d. The circumstance that the application came before the court supported by verified opinions of certain individuals, as to what would be a fair rent for the property without including scenery, properties, &c., which opinions were given and verified in answer to the receiver carefully put, as to what would be a fair rent per year, without including scenery, properties, &c., and which opinions were *ex parte*, and preliminarily obtained for the purposes of the application, should have induced the same scrutiny of the motives and good faith of the application; and should have led to further inquiry, as to the condition and value of the property, and the propriety of making the lease; and especially as to the propriety of leasing the theatre without scenery, &c., the papers showing that there was a large amount of scenic and other properties belonging to the theatre and to the trust estate, which it would have been most advantageous to have leased with the theatre.

4th. The verified opinions of Earl, Hess, Gibson, Barnum, Taman and Morris, that $20,000 would be a fair annual rent for the theatre, without scenery, &c., and the verified opinions of several of them, that with scenery, &c., from $22,000 to $25,000 would be a fair rent; and that to rent the theatre, without scenery, &c., would be a sacrifice to the estate, as the scenery, &c., would be of little use, if removed from the theatre, certainly should have led to the same scrutiny of the motive and good faith of the application, and to further inquiry on the part of the court, especially as to whether the scenery, &c., belonging to the theatre, and the trust estate should not be leased with the theatre.

5th. The unverified offer of Barney Williams, by letter to take a lease, for one, two, three, four or five years, at the yearly rent of $21,000, with security if required, of the

theatre, scenery, &c., belonging to the trust estate, (which offer appears to me perfectly consistent with the previous verified opinion, which the defendant had obtained from him, as to rent without scenery, &c.,) and his subsequent letter increasing this offer to $25,000 per year and the offers of Mr. Linn and Mr. Hess, by letters, to take a lease, for one, two or three years of theatre and scenery, &c., belonging to the trust estate, the one at a rent of $25,000, with security, and the other, at a rent of $22,000, with security, should certainly have induced the same scrutiny, as to the motive and good faith of the application, and should have led the court to make further inquiry as to the condition and value of the trust property, by a reference or otherwise, before granting the application, and making the order appealed from.

Without referring specially to other circumstances appearing on the face of the papers, I think, those which have been mentioned, show that the order appealed from, was inadvertently made, and that the application for it, was made by the receiver with a motive or purpose inconsistent with his duty and position as receiver.

I do not see the force of the circumstance suggested in support of the order, that Mr. Hayes had under the first lease, expended a large sum of money for permanent improvements, &c. Mr. Hayes and the receiver must be presumed to have known the law, and the terms of this prior lease, and that such of these improvements, as were fixtures, as between tenant and landlord, increased the value of the property, and called for an increased annual rent.

I will add that the strenuous efforts of the defendant as receiver, through eminent counsel, to retain the order as made, without reversal or modification, should lead us to suspect the good faith of his application as receiver, from the order appealed from; for as receiver, he cannot be permitted to say that he had or has, any interest other than his representative or official interest, as receiver, or indeed, any inter-

est, to be, or which can be, prejudiced, impaired or affected, by a reversal, or modification of the order.

Upon the whole, I think the order should be reversed, as made inadvertently, and without sufficient consideration being given to the circumstance, that the defendant made the application as receiver, or to the conceded circumstances under which it was made, tending to show at least, that the receiver might have made and supported his application with a purpose inconsistent with his duty as receiver.

But I do not think Mr. Hayes, the lessee, should suffer all the probable consequences which would follow, from an absolute, unconditional reversal of the order.

I think the order of reversal should have a provision or condition inserted in it, that such reversal shall not impair, or any way prejudice Mr. Hayes's possession or rights under the lease, for and during the residue of the first year of his term, that is, not before or until the first day of September next, (1869), but that from and including the first day of September next, (1869), the lease shall be void and of no effect, and that he, continuing in possession thereafter, shall be considered as a tenant holding over without the permission of his landlord, after the expiration of his term, and as in contempt of such order of reversal.

I am not sure, that it would be right to back up Mr. Hayes, in the height of the current theatrical season, and therefore I think the order of reversal should be conditional as above stated.

The order should also be reversed without costs to either party.

U. S. SUPREME COURT.

WHITE'S BANK OF BUFFALO, appellant agt. THE PROCEEDS OF THE SCHOONER ROBERT EMMETT, ROBERT SMITH claimant.

By the act of Congress of July 29, 1850, a *mortgage of a vessel*, which is recorded in the *collectors office at the home port*—that is, the port where the owner resides, in pursuance of the provisions of the act, takes effect by its own force, and irrespective of the filing of the mortgage in the county clerk's office, and has preference over any subsequent purchaser or mortgagee.

The cases of *Potter* agt. *Irish*, (10 *Gray*, 414) and *Chadwick* agt. *Baker*, (54 *Maine R.*, 9) holding that in order to protect the title of the purchaser or mortgagee of a vessel, under that act, it is necessary to record the bill of sale or mortgage in the office of the collector of customs at the *port of the last registry or enrollment*, though not the home port of the vessel, *overruled*.

Congress having created, as it were, this species of property, (ships and vessels) and conferred upon it its cheif value, under the power given in the constitution to regulate commerce, there can be no good reason for entertaining any serious doubt, but it has the power to pass a *recording act* to protect the rights and title of all persons dealing in such property.

December Term, 1868.

APPEAL from the circuit court of the United States for the northern district of New York.

LORENZO K. HADDOCK, *of counsel for White's Bank.*

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the northern district of New York.

The controversy in this case, arises out of the conflicting claims of two mortgagees to the proceeds of the Robert Emmett. One of the mortgages is executed by Gabriel Hoyt, owner of the vessel, to White's Bank, of Buffalo, on the 22d of May, 1863, for $4,000; the other by Henry Zahn, the then owner, to Robert Smith, on the 5th of June, 1865, for $6,000.

The mortgage to White's Bank, was recorded the 12th of June, 1863, in the collector's office at Buffalo, where the Emmett was duly enrolled, and at which place the owner resided. The mortgage to Smith was recorded in the collector's office at the port of Sandusky, Ohio, on the 17th of June, 1865, where the Emmett was also duly enrolled, and at which place the owner, Zahn, then resided.

The mortgage to White's Bank, was filed in the office of the clerk of the county of Erie, on the 5th day of June, 1863, according to the requirement of New York law, in respect to personal mortgages; but it was not re-filed at the end of a year as required by that law in order to perpetuate the lien.

The Emmett was libeled for seamen's wages on the 29th of August, 1865, which was a paramount lien on the vessel, and was sold under a decree in that suit. The remnants remaining in the registry of the dictrict court after satisfying this demand, constitute the subject of contest between the present parties. The last mortgagee, Robert Smith, claims that the lien of the mortgage to White's Bank was lost, on account of the omission to re-file it in the clerk's office of Erie county, at the end of the year, and which raises the material question in the case, namely: whether or not the recording of the mortgage in the collector's office at Buffalo had the effect, by its own force, and irrespective of the filing in the clerk's office, to give a preference to it, over any subsequent purchaser or mortgagee? The act of Congress, July 29, 1850, on this subject, is as follows:

"That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of customs where such vessel is registered or enrolled."

The next section provides for recording these bills of sale, &c., and also certificates of discharge and cancellation in a proper book. No provision was made for any authentication of these instruments preparatory to their being recorded. They were received by the collector from the parties delivering them, and were recorded with no proof of their verity, except from the execution of the same, as appeared on their face; and this, both as it respects the bills of sale, mortgages, &c., and the discharge and cancellation of the same. And the law thus stood for some fifteen years. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage, or other incumbrances of any vessel, shall be recorded unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgement of deeds."

Previous to this act of 1850, providing for the recording of bills of sale, mortgages, &c., of vessels, they were required to be filed by the laws of many of the states in the clerk's office, or some place of public deposit in the town or city where the vendor or morgagor resided, in order to protect the interest of the vendee or mortgagee against subsequent *bona fide* purchasers or mortgagees. And this practice continued in many places after the passage of the act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording act from the very imperfect provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office at the home port of the vessel furnishes a much readier opportunity to persons dealing in this species of property to obtain a knowledge of the condition of the title, than by the former mode under the state law. We say the home port, because it is quite apparent from the language of the act, "be recorded in the office of the collector of customs where such vessel is registered or enrolled," means the permanent registry or enrollment which is at the port, "at or nearest to which the

owner, if there be but one, or if more than one, the husband, or acting and managing owner of said ship or vessel usually resides. And the name of the said ship or vessel, and the port to which she shall so belong, shall be painted on her stern on a black ground in white letters of not less than three inches in length," and, if found without such name and the name of the port, the owner is subject to a penalty of fifty dollars. (*Act 31st December*, 1792, § 3.)

The same act provides for a temporary registry when the owner acquires her in a different district from that in which he resides; but this is to enable him to bring the vessel within the home district, or port, where she can obtain her permanent registry. The character of this temporary registry is expressed on the face of it, and is delivered up to the collector on the issuing of the permanent registry, whose duty it is, to return it to the collector that granted it—(*Id.*, § 11.)

So a registered vessel may be enrolled, or an enrolled vessel registered, on the master giving up to the collector the registry or enrollment, as the case may be; and if such vessel shall be in any other district than the one to which she belongs, the collector of such district upon the master taking an oath, that according to his best knowledge and belief, the property remains as expressed in a registry or enrollment proposed to be given up, and on giving the bond required, shall make the exchange above mentioned; but the collector to whom the registry or enrollment is given up shall transmit the same to the register of the treasury, and the registry or enrollment granted in lieu thereof, shall within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled.—(1 *U. S. St., p.* 140. § 3.)

This exchange of registry or enrollment, may occur in any part of a voyage or voyages, and the temporary registry or enrollment, continues till the vessel in the regular

course of her employment, arrives at the port to which she belongs, where she may again obtain a renewal of her permanent documentary title. As we have said, we think it apparent that the collector's office in the district in which this temporary registry or enrollment is made, is not the office contemplated by the act of 1850. The temporary papers are made in the office where the vessel happens to be at the time of the sale or exchange of the documentary title, and continues only till her arrival at the port to which she belongs. Her name and the name of her home port remains painted on her stern, notwithstanding this temporary document, and satisfies the requirement of the act in that respect, and both continue until a new home port is acquired by a change of ownership, requiring a permanent registry or enrollment on account of different residences of the owners, when the name of that port is substituted. And, confining the record to the home port, there is great propriety and convenience in requiring bills of sale, mortgages, &c., of the whole or parts of a vessel to be made matters of record in this office, as in the registries there are the names of all the owners under oath, together with their residences; and since the act of 1850, containing also the part or proportion of such vessel belonging to each owner (§ 5); and in this same section it is provided that "in all bills of sale of vessels registered or enrolled, shall be set forth the part of the vessel owned by each person selling, and the part conveyed by each person purchasing." And in this connection we may also mention, that in case of the sale of a vessel, which can only be to a citizen or citizens of the United States, and a new permanent registry becomes necessary, the former certificate of registry must be delivered to the collector to whom application is made for the new registry, to be transmitted by him to the register of the treasury, to be canceled; and in every such sale or transfer of a vessel there shall be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of the former registry,

otherwise the ship or vessel shall be incapable of being registered anew, (*Id.*, § 14). And as this bill of sale is recorded in the collector's office in which the new permanent registry is made,it affords information to any person examining it as to the former home-port and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage, or other incumbrance upon or against the vessel.

It will be seen, therefore, as the law now stands, there can be very little difficulty on the part of a purchaser or mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidences of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home-ports of the vessel, as the record of the last home-port refers to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry. In this respect the system of recording in the collector's office, possesses very great advantages over the filing of these instruments in the clerk's offices, where the vendor or mortgagor happened to reside at the time, as no means exist under this practice by which the subsequent purchaser or mortgagee, by any diligence, could obtain a knowledge of the actual condition of the title.

We are aware that in the case of *Potter* agt. *Irish*, (10 *Gray*, 414,) the court came to the conclusion, upon an examination of the acts on this subject, that bills of sale, mortgages, &c., under the act of 1850, in order to protect the title of the purchaser or mortgagee, should be recorded in the office of the collector of customs at the port of the last registry or enrollment, though not the home port of the vessel. And the court in the case of *Chadwick* agt. *Baker*, (54 *Maine R., p.* 9,) followed this decision.

Our respect for the courts rendering these decisions have led us to examine the several statutes upon which this question depends with more than usual care, and after the

best consideration we have been able to give, are obliged to differ with them. We think the better construction of these statutes, leads to the conclusion that the home-port was the one in the contemplation of Congress, at which these instruments were to be recorded, and is the more appropriate one in furtherance of the object for which the act was passed.

The temporary registry or enrollment, is at a collector's office, in a district where the owners do not reside, and is made without any reference to such residence. It is made at any collector's office, and at any ports within the limits of the United States, where the vessel may happen to be at the time this temporary document is registered.

While the home-port may be at the city of New York, the temporary registry or enrollment, may be made at New Orleans or San Francisco, or Portland, in Oregon, where it would be as inconvenient for the vendee or mortgagee to make a record of the bill of sale or mortgage, as it would be for a person dealing in this species of property to acquire any notice of such record; whereas, a record at the home-port is within the district where the owners reside, and where negotiations or dealings in respect to this species of property would naturally be conducted.

Some question is made as to the power of Congress over the title and property of vessels of the United States, to such an extent, as to enable it to pass a recording act.

But, after the regulation of this species of property by the several acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent *bona fide* purchasers and mortgees therein.

Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1, 1789; and those which, after the last day of March,

1793, shall be registered or enrolled in pursuance of the act of the 31st of December, 1792, and must be wholly owned by a citizen, or citizens, of the United States, and to be commanded by a citizen of the same. (1 *U. S. St., p.* 287.)

And none can be registered or enrolled, unless built within the United States, before or after the 4th of July, 1776, and belonging wholly to a citizen or citizens of the United States, or not built within said states, but on the 16th of May, 1789, belonging, and thence continuing to belong, to a citizen or citizens thereof; or ships or vessels captured from the enemy in war, by a citizen, and lawfully condemned as prize, or adjudged to be forfeited for a breach of the laws of the United States, and being wholly owned by a citizen or citizens thereof.—(*Id.*, § 2, *p.* 288.)

Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt, but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction. (*The Martha Washington*, 25 *Law R.*, 22; 19 *Alabama R.*, 722; 8 *California R.*, 363; 36 *Miss. R.*, 296.)

The decree below reversed, and a decree entered for the appellant.

SUPREME COURT.

Asher L. Selover and Cephas Culver agt. Conrad Wisner.

Where the plaintiff obtains a verdict at the circuit for $50 or over, and the defendant makes and serves a case, for a new trial, the plaintiff is entitled to costs for:
"Making and serving amendments to case $10.
On aplication for new trial on a case made before argument $20.
For argument $40."

Schuyler Special Term, April, 1869.

Motion by plaintiffs for a readjustment of their costs.

M. M. Mead, *for plaintiffs.*
J. McGuire, *for defendant.*

Balcom, J. This action was tried at the Schuyler circuit in April, 1868, when the plaintiffs obtained a verdict for $50, damages. The defendant made a case, to which the plaintiffs proposed amendments. The case was settled and the defendant made a motion thereon for a new trial at the Tompkins special term in September, 1868, which motion was denied with costs. The plaintiffs' costs were adjusted by the clerk of Schuyler county in February, 1869. He struck out of the same the following items, viz.:

"Making and serving amendments to case.....$10.
On application for new trial on a case made before argument..... 20.
For argument..... 40."

The plaintiffs' counsel contends that the clerk erred in disallowing these items and in striking the same from the plaintiffs' bill of costs.

It is provided by subdivision three of section 307 of the Code, as amended in 1866, that a party shall be allowed ten

dollars "for making and serving amendments to a case." (*Laws of* 1866, *vol.* 2, *p.* 1840.) And that subdivision of section 307 remains unaltered and is in force. The clerk therefore erred in striking out of the plaintiffs' costs the charge of $10, for "making and serving amendments to case."

Subdivision five of section 307 of the Code, was amended in 1867 so it reads as follows, viz.:

"5. To either party on appeal, except to the court of appeals and except appeals in the cases mentioned in subdivisions one, three, four and five of section 349, and except in cases mentioned in the second paragraph of section 344, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either party before argument and for argument on application for judgment, upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial on a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265." (*Laws of* 1867, *vol.* 2, *p.* 1924.)

An application for judgment upon a special verdict, or for a new trial on a case made, must in the first instance be heard and decided at the circuit or special term. (*Code*, § 265.) For this reason and the reasons assigned in *Scudder* agt. *Gori* (18 *Abb.*, 207), I am of the opinion the plaintiffs were entitled to $20 on the defendant's application for a new trial on a case made before argument at the special term, and also to $40 for argument at such term in opposition to the motion for a new trial. The reasoning on this question in *Scudder* agt. *Gori* (*supra*), is conclusive in my judgment in favor of the allowance to the plaintiffs of these items of costs.

My conclusion therefore is, that an order should be made directing the clerk of Schuyler county to readjust the plaintiffs' costs and allow the above mentioned rejected items and strike from such costs the charge of $10 allowed on the mo-

tion for a new trial. And the order will also direct such clerk to amend the judgment roll in the action and the docket of the judgment so as to conform to the amount of costs as readjusted.

No costs are allowed either party on this motion.

SUPREME COURT.

JOHN A. STITT agt. NICHOLAS D. ROWLEY and WASHINGTON ROWLEY.

On a motion for a *new trial* at special term, upon a case, the successful party is entitled to costs: "Before argument $20. For argument $40. (*This agrees with the next preceding case of Selover* agt *Wisner.*)

Chemung Special Term, April, 1869.

MOTION for retaxation of costs.

————*for plaintiffs.*
————*for defendants.*

BOARDMAN, J. This is a motion for a retaxation of costs, and that the clerk allow the defendants $20 before argument, and $40 for argument on a motion for a new trial at a special term upon a case.

The conflicting decisions, prior to the amendment of § 307, sub. 5, in 1862, except the case of *Jackett* agt. *Judd,* (18 *How.,* 385) give no aid in deciding the question under consideration, since the allowance, whether given or rejected, had no relation to the ground on which it is here claimed. In *Jackett* agt. *Judd,* the construction given § 307, corresponds exactly, with the subsequent amendment; but Justice MARVIN, holds that only $10 costs can be taxed on the motion for a new trial at special term on a case, because, in no sense is such a motion a trial of an issue of law. He overlooks the fact that his subsequent construction of the section makes the costs claimed allowable, not as the trial of an issue of law, but because the same costs must be allowed as are provided for on the appeal, indicated in that section. The case of *Lawrence* agt. *Smith,* (18 *Abb. Pr. R.,* 197) follows the above authority and rests entirely upon it. Both cases were decided at special term.

In *Scudder* agt. *Gori*, (28 *How., Pr. R.*, 155; *S. C.*, 3 *Robt. R.*, 629 *and* 18 *Abb.*, 207) the opposite view is taken and such costs are allowed. The reasoning in this last case satisfies my judgment. The section gives to either party on appeal, with certain exceptions, before argument $20, for argument $40, and the same costs are then granted in four other cases.

1st. On application for judgment upon special verdict.

2d. Upon application for judgment upon verdict, subject to the opinion of the court.

3d. Upon application for a new trial on a case made.

4th. In cases where exceptions are ordered to be heard in the first instance at a general term.

In the 1st and 3rd cases, the application must be made at special term, in the other two cases it must be made at the general term. In the last case, all practitioners agree that costs as claimed, must be allowed. Yet it is not an appeal, but simply a motion as in the present case. The authority for taxing the costs as of an appeal, is derived from this section of the Code. Its force applies equally to each subdivision named above. If in any one $10 motion costs alone can be allowed, it must be true of all.

Such is the view taken by works on practice. (2 *Whittaker, Pr.*, 951; 2 *Tiff. & Smith*, 433; 2 *Tilling. & Shearman*, 640 *and note. See also, Warner* agt. *West. Trans. Co.*, 5 *Robt.*, 490, *where the same view is obscurely taken*).

I have consulted Mr. Justice PARKER, who concurs in this view, but has never had occasion to decide the question formally.

The motion is accordingly granted with $10 costs, and the clerk is directed to re-adjust the costs in accordance with the views by me expressed.

The foregoing opinion having been examined by Justice BALCOM, he concurs in it for the reasons contained in his opinion in *Selover et. al:* agt. *Wisner, ante page*, 176.

SUPREME COURT.

JOHN COPE, Jr., administrator of JOHN McCRANEY and ELIZABETH P. McCRANEY agt. JULIAS T. ALDEN.

An agreement for the *loan of money*, made and consummated in this state by residents thereof, by which the borrower is to give a bond accompanied by a mortgage upon lands in Wisconsin, no place of payment being specified, is governed by the usury laws of New York, and not those of Wisconsin.

Broome General Term, July, 1867.

MASON, BALCOM, and BOARDMAN, *Justices*.

THIS case comes up for a second review (*see* 46 *Barb.*, 272) on a motion by the plaintiffs for a new trial on exceptions ordered to be heard in the first instance, at general term.

The action was brought to recover surplus moneys on a statutory foreclosure of a mortgage given by plaintiffs to defendant, on the 31st day of January, 1860, on premises in Oneonta, N. Y., for $800. The sale took place on the 10th day of may, 1862, when the premises were bid off by defendant for $2,300, leaving a surplus of $1,379.11. The defendant seeks to retain the moneys by virtue of a mortgage given by plaintiffs to defendant, July 5, 1861, on the same premises.

The plaintiffs, by way of reply, claim that the latter mortgage was usurious, because a portion of the consideration thereof, was a bond and another mortgage given to defendant by plaintiff Elizabeth. That on, and prior, to the 22d day of November, 1858, all the parties were residents of Oneonta, in this state, where plaintiff Elizabeth, made an agreement with defendant, by the terms of which he was to loan her $900, for which she was to give him a bonus of $100: that for the payment of the $1000, she was to give

him her bond for $1,000 and interest, and a mortgage upon certain lands in Grant county, Wisconsin. That the defendant at Oneonta, paid her $1,000 when she gave him back $100 and delivered him her bond and the mortgage agreed upon, neither of them specifying any place of payment.

It appeared on the trial, that the legal rate of interest in Wisconsin, in the absence of a special agreement between the parties, is seven *per cent*, but that twelve *per cent* may be reserved by special agreement. That where more than twelve *per cent* is reserved, the excess over twelve *per cent* only is forfeited and the agreement is valid and may be enforced for the principal and all interest not exceeding twelve *per cent.*

The court directed a verdict for the defendant on the ground that the contract was governed by the laws of Wisconsin and was not usurious.

L. L. BUNDY, *attorney.*
N. C. MOAK, *of counsel for plaintiffs.*
STURGES and COUNTRYMAN, *for defendant.*

By the court, MASON J. The only important question in this case, is whether the bond and mortgage executed by the plaintiff Elizabeth McCraney, to the defendant on the 22d day of November, 1858, for $1,000 was usurious or not. At the time of the execution of the said bond and mortgage, both Mrs. McCraney and the defendant resided at Oneonta, in the county of Otsego, in this state, where both the agreements to loan the money were made, the bond and mortgage were executed and delivered, and the money was paid thereon. The mortgage was upon lands in Grant county, in the state of Wisconsin. Neither the bond nor the mortgage designated any place of payment. The agreement between the parties was, at the time, that the plaintiff Mrs. McCraney, should give to the defendant a bond and mortgage on these lands in Wisconcin for $1,000, that the

defendant should advance to her $900, and the $100 should be given as a bonus for the loan, which was done accordingly. The question presented for our decision is, whether this is a contract to be governed by the laws of the state of New York or Wisconsin, and I entertain no doubt but that it must be regarded as a New York contract, where the *lex loci contractus* controls.

Every concomitant to make it a New York contract seems to exist in the case. The parties reside here, the loan was made here, the securities were executed here, the money is certainly payable here where the parties reside.

Upon such a state of facts I am not able to discover any principle of law upon which this can be pronounced a Wisconsin contract, and no adjudged case has been referred to upon the argument, nor have I been able to find any which would hold it such. On the contrary the very reverse was held by the supreme court of the United States in the case of *DeWolf* agt. *Johnson*, (10 *Wheat. R.*, 383) where it is expressly decided that the *lex loci contractus* must grovern in a question of usury although by the terms of the argreement the debt was to be secured by a mortgage on real property in another state. The case is cited with approbation in the case of *Anderson* agt. *Pond*, (13 *Peters R.*, 78.) The case of *Newman* agt. *Kerson* (10 *Wisconsin R.*, 333) is directly in point and decides the very question presented in this case. The suit was brought in that case to foreclose a mortgage in Wisconsin; the parties both resided in New York where the loan was made and the bond and mortgage was executed on lands in Wisconsin, and chief Justice Dixson in giving the opinion of the court says: "We have no doubt that this contract is to be governed by the laws of New York," (*see p.* 340). He adds: "In this case the parties all reside in New York, the loan was made there, was to be repaid there, and the laws of that state must govern the contract as to its validity and effect," (*see p.* 344.)

The principle of these cases is affirmed by Chancellor KENT in his Commentaries. (3 *Kent's Com.*, 460, 3*d ed.*) He says the general doctrine is that the law of the place where the contract is made is to determine the rate of interest, when the contract gives, specifically, interest, and this will be the case though the loan be secured by a mortgage on lands in another state, unless there are circumstances to show that the parties had in view the laws of the latter state it respect to interest. And Judge STORY affirms the rule to be the same. He says, whether a contract is usurious or not depends not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract was made and is to be executed, (*Story's Conflict of Laws*, § 292, *5th ed.*), and he adds, "in cases of this sort it will make no difference that the due performance of the contract is secured on other security, situated in another country where the interest is lower." (§ 293.) In section 287 he declares the rule to be that where a loan is made in one state and security is to be given therefor in another state by way of mortgage, that the law of the place where the loan is made is to govern, for the taking of a foreign security does not necessarily alter the locality of the contract. Taking security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is given.

The legal fulfilment of a contract of loan on the part of the bondsman is the repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract, (*Story' Con. Laws*, § 287), which is a mere reiteration of what was said by the court in *De Wolf* agt. *Johnson* (10 *Wheat. R.*, 367). This doctrine has never been overruled in any case which I have been able to find. The case of *Chapman* agt. *Robertson* (6 *Paige R.*, 625), is relied on by the defendant in this case, but in that case the

contract was made between a citizen in this state and a British subject in England. The bond and mortgage were executed by Robertson here, recorded here and forwarded to Chapman in England, who advanced the money upon them by depositing the same with Robertson's banker for his use. The chancellor holds that as the payee resided in England at the time of the making of the contract, the bond and mortgage naming no place of payment, the legal construction of the contract is that the money must be paid where the obligee resides, &c. Whatever may be thought of this case, and its soundness has been questioned by Chancellor KENT in his Commentaries, and by Judge STORY, it decides nothing in the case before us. It is evident from the opinion of Chancellor WALWORTH in the case that he excepts this case, and indeed seems to hold this contract usurious. After citing *Stapleton* agt. *Conway* (3 *Atk. R.*, 727), where Lord HARDWICK held that a mortgage upon land in the colonies, if executed in England and connected with a bond or other personal covenant for the payment of more than five *per cent* interest was usurious and void, &c. Chancellor WALWORTH says on page 632, "doubts might well exist as to the validity of loans made in England upon such securities where both parties resided there, especially if the money was not loaned for the purpose of being used in the colony where the mortgaged premises were situated, as the giving of such a security might be a very convenient mode of evading the statute of usury."

This meets the very case before us. The case of *Balme* agt. *Wombough*, (38 *Barb., R.*, 352), relied upon by the defendant's counsel, decides nothing in the case at bar. All that case decides is, that promissory notes made and dated in Minnesota for money there loaned and advanced payable at a bank in the state of New York, with interest at 25½ *per cent* per annum, and secured by mortgage, on land in Minnesota, will not be declared void by the courts of this state or directed to be surrendered and canceled. The case holds

just what has been decided in a good many other cases, that the general rule, that the validity of the contract is to be decided by the laws of the place, where the contract is to be performed, does not apply to cases involving the rate of interest where it is stipulated in the contract at the place where the loan is made in conformity with the law of the place, that a higher rate of interest shall be paid than is allowed by the place of performance, but that the *lex loci contractus* governs (1 *Paige R.*, 220; 20 *Martin's Lon. R.*, 1; 6 *Paige R.*, 627; 7 *Paige*, 632; 22 *Barb. R.*, 121; 20 *Eng. Law and Eq.*, 555; 2 *Kent's Com.* 460; 2 *Parsons on Contracts*, 95, *also note E*). And it is this class of cases upon which the defendant's counsel seems mainly to rely in this case. It is not necessary to consider the soundness of the rule laid down in these cases, as they decide no principle involved in the case under consideration; but as I understand the case of *Lee* agt. *Sellick*, (33 *N. Y. R.*, 615) the court of appeals there decides, that the liability of a maker on a promissory note executed in New York, and payable in Illinois is controlled by the laws of Illinois, the state in which his engagement is to be performed, and whether that court will allow the symmetry of the law to be marred by making the question of usury in a case like the present, an exception to this certainly general rule, remains to be seen.

The doctrine laid down in 9 *Allen* (*Mass.*) *R.*, 78, and many other cases holding that the laws of the state where the lands are situated must control as to the form of the mortgage or deed, its manner of execution and acknowledgement, &c., have nothing to do with the question in this case. It is true that in all these respects, the law of the state where the lands are situated must control, but that does not touch the question of usury in the case. It is said that this contract was entered into by these parties upon the understanding and with the intent to bring it under the laws of Wisconsin and not of New York. I have sought in vain for any evidence of this in the case. They make the con

tract here in this state, the parties reside here, the money is advanced here, the bond and mortgage are executed and delivered here, the payment was to be paid here, and the whole thing was done and to be done under the laws of this state, excepting the mortgage as a security for the loan was upon lands in Wisconsin, and had, of course, to be recorded there. As a general proposition it cannot be denied that contracts as to their validity, are to be tested by the laws of the state where they are made, and are to be executed, and it was held in the case of *Jewett* agt. *Wright*, (30 *N. Y. R.*, 259) that where a note made and dated in this state, and payable at a bank here, was negotiated in another state, that the laws of New York are to control as to the defense of usury.

This is upon the ground that the law regards the contract as coming under and consequently governed by the law of the state. In the case at bar it seems to me very clear that the court should have held this bond and mortgage controlled by the laws of this state, and consequently usurious, without submitting any fact to the jury. And in any view which can be taken of the case, upon the facts of the case, it is certainly usurious if made to avoid the usury laws of this state. (*Chapman* agt. *Robertson*, 6 *Paige R.*, 632.)

If there was any doubt upon this subject, it should have been submitted to the jury to determine, but I do not think the case upon the undisputed facts can be brought under the laws of Wisconsin, but must be held to be a New York contract.

As the $1,000 mortgage went into and formed a part of the consideration of the $1,669 mortgage the latter is also usurious as is held in all the cases. (*Peirce* agt. *The Lyons Bank*, 33 *N. Y. R.*, 55; *Jackson* agt. *Nichols*, 1 *Seld. R.*, 178; 35 *Barb. R.*, 96; 20 *John. R.*, 285; 6 *Cow. R.*, 647; 21 *Wend. R.*, 103, *and the mortgage is void as to the whole*, 17 *Barb. R.*, 397; 21 *Barb.*, 361.) If I am right in the views above expressed, it follows that the defendant cannot

hold these surplus moneys on this mortgage, for they being usurious gave him no valid lien upon the premises.

A new trial must be granted, costs to abide the event of the action.*

*The case is now pending in the court of appeals, on an appeal from the decision of the supreme court after the third trial.

NEW YORK COMMON PLEAS.

Asa H. Ferguson, agt. The Metropolitan GasLight Company.

A *Gas Company* is not bound to furnish a *separate meter* for each floor of a house, unless the owner or occupants put in separate or independent *service pipes*, to connect with the meter.

General Term, 1868.
Present—Daly P. J., Brady and Cardozo J. J.

Hooper C. Van Vorst, *counsel for appellants.*
Francis Byrne, *counsel for respondent.*

By the court, Brady, J. The plaintiff occupied one floor of a dwelling or tenement house in this city. The owner had put in it the service pipes for gas, according to the regulations of the defendants. He applied for gas which was supplied through one meter, placed in the cellar of the house. He also applied for separate meters for each floor, which were not furnished by the defendants, and it would seem because he had not put into the house separate or independent service pipes for each floor to which the meter might be connected.

It does not appear that this application being refused, he took any steps to enforce his demand.

It is conceded that the pipes in the house were sufficient to serve it with gas, and that gas could be carried to all parts of it through them.

The plaintiff when he became an occupant, also applied for gas, and the defendants answered by saying that they had

already furnished it to the building,and refused to place a meter on the plaintiffs' floor, unless separate and independent service pipes were provided. The plaintiffs' application was not in fact alone for gas, but for a separate meter as well. He wanted the meter as he stated on the trial, and the question really involved in this controversy is, whether the defendants were bound to furnish it.

The plaintiff sues for a penalty under the sixth section of the act of 1859, (*Laws, p.* 698), which provides that all gas companies shall supply gas to the owner or occupant of any building or premises, which may be required for lighting it or them, upon a written application therefor to be signed by him. It also provides, that if for the space of ten days after such application, and the deposit of a reasonable sum as in the act provided (if required), the company shall refuse or neglect to supply gas, they shall pay to the applicant the sum of ten dollars and five dollars for every day thereafter during which such neglect or refusal shall continue.

It will be observed that there is no qualification on the obligation imposed by the statute. The gas must be furnished or a penalty is incurred, which continues from day to day, as long as the refusal or neglect to supply it is continued. It will also be observed, that the section referred to, does not either directly or indirectly require the company to furnish a meter, either to the owner or occupant, for the whole or any part of the premises, and the act is equally silent as to the mode by which the gas shall be conveyed through the houses.

The plaintiff seeks the enforcement of a penalty, and whether the statute be regarded as penal or remedial, and one, either to be strictly or liberally construed, his claim is not within its purview. Assuming that he is the occupant of premises within the meaning of the statute, which may well be questioned, and that he had the right to apply for gas, the answer to his demand is, that gas was supplied through the pipes provided by his landlord, which he could

use if he chose to do so, and the response disposes of his claim. The owner of the building had exhausted the power to compel the defendants to furnish gas, under section six of the act referred to. They had granted his application for it, although they had declined to furnish separate meters, a neglect or refusal of which to him, he alone could take advantage of. The gas having been thus furnished, no penalty was incurred by them, unless the omission to supply a meter to the plaintiff is fairly within the application for gas and included in it.

This cannot be. The meter is employed for the benefit not of the consumer but the company, and cannot be used without tests which the former may insist shall be applied § 5. If the company prefer, they may supply the gas without it, for aught that appears in this case. The statute does not require them to furnish it and that in itself may be sufficient to dispose of this case. If the statute be strictly construed, the defendants are not liable, because they have furnished gas to the building which includes the premises occupied by the plaintiff, and which only they were bound to furnish, and if it be liberally enforced, then the defendants should not be obliged to provide an article which is not required by the letter of the law, nor necessary to the plaintiff for the enjoyment of the light which he desires, nor should such a construction create a duty which under its provisions is not declared.

It must be said in addition, that if it were otherwise considered, that the defendants should not be prohibited from adopting reasonable rules with reference to the introduction of gas, protective of their own interests.

They proved on the trial, that it was not customary to put in separate meters such as demanded by the plaintiff, without separate service pipes, and that they were necessary to prevent "tapping," which would result in a fraud upon their rights. The legislature has by various provisions in the act of 1859, sought to guard them against fraud and

theft, and has taken the lead in anticipating violations of fair dealing, against which corporations as well as natural persons are guaranteed under our laws, the right to protect themselves, even in the discharge of duties imposed upon them.

For these reasons the judgment should be reversed.

SUPREME COURT.

HARRISON R. FORBES, respondent agt. LOOMIS WILLARD, Impleaded, &c., appellant.

An *order* of the court made for the *punishment* of a party for not answering in *proceedings supplementary to execution* is appealable.

Where a witness or party, in supplementary proceedings, declines to answer questions propounded to him, on the ground that his answers will have a tendency to *criminate* him; it is the province of the court to determine whether that *will probably be the effect of the answers*, if they are required to be given. And when it is fairly ascertained that such will not be the effect of the answers, he should be required to answer the questions put to him.

The provisions of the Code were intended to give the creditor complete authority for a full and searching examination of the judgment debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor had made, or attempted to make, of his property. And by an express provision its enactments are not to be strictly construed.

The object plainly intended by the amendment in 1863, to section 292, was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatever, on account of the *purposes* for which he might have disposed of it.

It could not have been intended to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him. But to include within it, all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property, whether by written conveyance, assignment or transfer, or by *transfers* which should prove to be made by actual delivery, following or accompanying an agreement by *parol*.

Therefore, the debtor may properly be required to answer fully, concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise, notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it, and without any qualification or restriction arising out of the nature and character of such crime.

Where the inquiries made of the debtor, have reference to the *source* from which, and the *means* by which he may have acquired his property; in discovering these facts, the debtor may be compelled, if he is required to answer, to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1863.

This he could not be required to do, unless the case is brought within the fifth part of § 292 of the Code, which is limited to commissions of *fraud*. For the rule of the common law is well established, that no person, whether a witness or a party, shall be compelled to answer, when examined on oath as such, in a judicial proceeding, where the effect of his answer would expose him to a prosecution for a crime.

The provisions of the Code under said amendment that "no person shall on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a

fraud," is not to be restricted simply to a fraud in the disposition of the debtors property, but to *any fraud* whatsoever.

Held in this case, that the questions were pertinent to the inquiry the creditor was authorized to make—having reference to commissions of fraud by the debtor, and he was required to answer.

Erie General Term, February, 1868.

Before DAVIS, MARVIN *and* DANIELS, *Justices.*

PROCEEDINGS were taken in this action, supplementary to the recovery of a judgment against the defendant and the issuing and return unsatisfied of an execution against his property. Upon his examination nine different interrogatories were propounded to him by the plaintiff's counsel, which he declined to answer, on the ground that his answers would tend to convict him of a crime, other than the crime of fraud. The particular crime he was apprehensive his answers might tend to convict him of, was stated in his objection to answer some of these interrogatories, to be that of conspiracy.

His refusals to answer were certified by the referee to the county judge of Niagara county. Who on the application of the plaintiff's counsel issued an attachment against the defendant, on which he was arrested and taken before the county judge. Interrogatories were filed with the county judge, which the defendant was required to answer. And in his answers, by way of justifying his refusals to answer before the referee, he stated that he had been arrested on a warrant issued by the police justice of the city of Lockport, on a complaint made against him by the plaintiff's counsel, charging him with the crime of conspiracy with others, to cheat and defraud the plaintiff and the public generally, by means of false and fraudulent drafts, purporting to have been issued by the Canton Banking House, and obtaining money and property by means of false drafts from the plaintiff and the public generally.

The questions he was required to answer were:

1st. Whether he had seen the plaintiff about the middle of December, 1865? 2d. Whether about that time he re-

ceived of him at Toronto, about three thousand and sixty dollars in Canada currency? 3d. Whether he received any, and if any how much money in Canada in December, 1865? 4th. Whether he had in his possession in December, 1865, money or currency amounting to three thousand dollars? 5th. What money in bills or coin he paid out or delivered to any person or persons, in December, 1865, or any time since then, and the consideration for such payment or delivery? 6th. How much money he had in December, 1865, or at any time since then? 7th. Whether since November, 1865, he had done any business in his own name, and if he had, what the business was? 8th. The amount in value he had had at any one time of the proceeds of his own business transactions, since November, 1865? And 9th. What other money or property he had had, except what was derived from the farm, since November, 1865?

The judgment in this action was recovered for money advanced by the plaintiff in discounting the drafts referred to in the defendant's explanatory statement. And in declining to answer the interrogatories propounded to him, he offered to answer as to any other business transaction by him, and as to any other money or property he had received, except such as connected with or derived from drafts drawn by the Canton Banking Company.

The county judge held that the defendant was bound to answer these interrogatories, and overruled his objections to doing so, and ordered a commitment to issue against him commiting him to the jail of Niagara county, until he submitted to answer or should be otherwise discharged, and imposed a fine upon him sufficient to indemify the plaintiff for the costs and expenses of the proceedings. This order was entered with the county clerk and the defendant appealed from it to this court.

RICHARD CROWLEY, *for appellant.*
A. W. BRAZER, *for respondent.*

By the court, DANIELS, J. The plaintiff's counsel objected upon the argument of the present appeal, that the order made by the county judge was not appealable, and relied upon *Mitchels case*, (12 *Abb.*, 249) in support of the objection. That case affords the plaintiff no assistance whatsoever in that respect. It was an appeal taken in a proceeding against an attorney for a contempt in the course of the trial of an issue of fact. And the order of the court made in that proceeding, was held not to be appealable. The question whether an order made for the punishment of a party for not answering in proceedings supplementary to execution, was appealable or not, was in no manner involved in the case. The right of the party affected by such an order to appeal, is dependent upon the provisions of the Code of Procedure relating to proceedings supplementary to execution, and not upon the statutory provisions relating to proceedings for the punishment of contempts.

As to the former, the Code provides that appeals may be taken to the general term of this court from orders made by a county judge, in such proceedings, where the order appealed from, affects a substantial right (§§ 248, 349 *of Code of Procedure*). And certainly, few, if any orders, can be made in such proceedings, more serious or certainly affecting substantial rights, than those which deprive the party of his liberty for an indefinite period of time, as the order in controversy clearly does that of the defendant. In the case of *Clapp* agt. *Lathrop*, (23 *How.*, 424); *Holstein* agt. *Rice*, (15 *Abb.*, 307); and the *National Exchange Bank* agt. *Hannigton*, decided in this district, no doubt was entertained, but an order made in these proceedings directing a party to be punished for a contempt in not answering questions propounded to him concerning his property, was an appealable order under the provisions of the Code already referred to. And these clear and ample provisions leave no room for any substantial doubt upon that subject. The objection that the

order is not an appealable order, must therefore be overruled.

Where a witness declines to answer questions propounded to him on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if they are required to be given, (*Cowen and Hill's notes, 2 Philips Evidence, part 2, 737, 739, and cases there cited*). And when it is fairly ascertained that such will not be the effect of the witnesses answers, he should be required to answer the questions put to him. Under this rule the defendant should certainly have answered the fourth, sixth, eighth and ninth interrogatories propounded to him. By these, he was required to answer, whether in December, 1865, he had in his possession money or currency, amounting to three thousand dollars? How much money he then had, and how much at any one time, since November, 1865, he had had of the proceeds of his own business transactions, except what had been derived from the farm?

These answers would not have had any tendency to criminate the defendant, for they do not ask him to disclose the source, person or circumstances, from or under which the money or property had been derived. They inquire simply as to the fact of his having had money in his possession after the month of November, 1865.

The fifth interrogatory propounded, was within the spirit of the amendment made to § 292 of the Code in 1863. By that interrogatory he was asked to state what money in bank bills or coin he had delivered or paid to any other person or persons, since December, 1865, and the consideration for such delivery or payment? The provisions of the Code were intended to give the creditor complete authority for a full and searching examination of the judgment debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor had made or attempted to make of his property. And by an express

provision, its enactments are not to be strictly construed (§ 467.)

By the amendment to § 292 made in 1863, it was provided that the debtor shall not "be excused from answering any question, on the ground that he has before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." The object plainly intended by this amendment, was to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatsoever, on account of the purposes for which he might have diposed of it. It could not have been intended to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him. But to include within it, all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property. No reason existed for extending this right of examination to cases where the debtor had made a written conveyance, assignment, or transfer of his property, which did not also require it to be extended to cases where the transfer should prove to be made by an actual delivery, following or accompanying an agreement by parol.

On the other hand, not only the same propriety, but the same necessity, required that it should be equally provided for all cases alike. And from the language made use of, it may be fairly inferred, that it was the intention of the legislature so to extend it by the enactment of this amendment. Otherwise, the word "transfer" would not have been used, for the terms "conveyance" and "assignment" were themselves sufficiently comprehensive to include all those cases where the debtor disposed of his property by deed or other instrument in writing.

When the debtor delivers over to other persons his personal property, or choses in action, by way of performing

agreements made to defraud his creditors even though it may be done without any writing whatever, he practically and effectually does execute a transfer of such property and choses in action within the fair intendment of those terms as they are used in this amendment. It could not have been intended by the amendment that the debtor should be excused from answering where the transfer should prove to be made without writing, and to require him to answer if it was attended with the only additional circumstance of being made by writing. No reason exists for making any such discrimination. On the other hand, it would be unnatural as well as absurd. Under this amendment therefore, the debtor may properly be required to answer fully concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise, notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it, and without any qualification or restriction arising out of the nature and character of such crime.

The other interrogatories propounded to the defendant which he refused to answer, do not relate to the disposition which the debtor may have been supposed to have made of his property, or to the property he merely had in his possession or under his control But they have reference to the source from, and the means by which he may have acquired it. And in discovering these facts the debtor may be compelled, if he is required to answer, to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1863. This he could not properly be required to do, unless the case is brought within the fifth part of § 292 of the Code. For the rule of the common-law is well established, that no person whether a witness or a party, shall be compelled to answer when examined on oath as such in a judicial proceeding, where the effect of his answer would be to expose him to a prosecution for a crime (*Henry* agt.

Bank of Salina, 1 *Com.*, 83; *Short* agt. *Mercier*, 1 *Eng. Law and Eq.*, 208). And that rule continues to exist in full force, so far as it has not been abrogated by positive legislation.

In these proceedings, such legislation so far as it becomes necessary at present to consider it, extends no further than to require that the party or witness shall answer, even though his answers may show that he has been guilty of a fraud. The case of *Clapp* agt. *Lathrop*, (23 *How.*, 423), was relied upon on the argument as an authority favoring the restriction of this provision to cases of fraud in the disposition of the property of the debtor. But the question whether it should be so restricted, was not presented in that case. And the decision itself does not indicate that the court pronouncing it intended to decide that point. The provision in the Code is subjected to no such limitation. By that it is declared that "no person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud," (§ 292 *of Code*,) not simply of a fraud in the disposition of his property, but of any fraud whatsoever.

Wherever one person is guilty of a fraud in disposing of his property, the other who receives it from him with a like intent, is also equally guilty of a fraud. And yet under this provision, the latter would be clearly bound to answer. The peculiar nature or quality of the fraud, the answers of the party or witness may tend to show he has committed, is not important. Neither does his obligation to answer depend upon the circumstance that the party or witness interrogated may or may not have committed the fraud alone; such a construction would be so restricted as to render this provision of the law of scarcely any practical benefit. Wherever the party or witness interrogated may have comitted a fraud, whether solely, or united and combined with others, it is still a fraud within the intent and meaning of the language used in this section, and the necessary disclosure of

it by the answers required to be given in the course of the examination for the discovery of the debtors property, constitutes no legal justification for the party or witness, who on that account refuses or declines to answer the questions propounded to him for that purpose—Whether the fraud has been committed in disposing of, or in receiving, purchasing or otherwise acquiring the property which forms the proper subject of such an examination, and its disclosure is required in the lawful and legitimate course of the examination for the purpose of making the discovery, the creditor is entitled to demand concerning the property of his judgment debtor. Neither the debtor nor any witness produced by him or the creditor, is at liberty to shield himself from answering, because the answers required will lead to that disclosure. The questions of course, must be pertinent to the inquiry which the law allows to be instituted by the creditor against the judgment debtor. Where they are not so, both the debtor and the witnesses produced in the course of the examination, would be entitled to be protected in refusing to answer them.

The questions in this case were pertinent to the inquiry the creditor was authorized to make. By them, the debtor was required to state whether he received of the plaintiff about three thousand and sixty dollars, in Canada currency at Toronto, in December, 1865, whether he received any, and if any, how much money in Canada, in December, 1865, and whether he had done any, and if any, what business in his own name, since November, 1865? These questions he declined to answer, on the ground that his answers would tend to show that he had been engaged in a conspiracy to defraud the public by negotiating and selling spurious drafts. In other words that he had acquired his property by the commission of a fraud. Whether that fraud affected the plaintiff alone, or whether its successful execution affected a large portion of the public, can make no difference in the construction of the language the legislature have used. It

is still a fraud, and it is no more than that, even if the defendant did conspire and combine with others in the commission of it; and as such he was bound to disclose it, if its discovery became essential to the complete examination the creditor had a right to prosecute, for the purpose of ascertaining the nature, condition, extent and situation of his property. That it was essential to that end was not denied upon the argument of the present appeal. The order appealed from should therefore be affirmed.

DAVIS and MARVIN J.J. concur.

N. Y. SUPERIOR COURT.

GEORGE W. HOLTSINGER agt. THE NATIONAL CORN EXCHANGE BANK.

General words in a *power of attorney*, cannot be construed to extend or enlarge the power beyond the subject matter of the agency, as expressed in the previous parts of the instrument.

Where the power is "to ask, demand, receive and receipt for any and all pay and allowances due me from the Government of the United States, on account of my services (in the army) &c., and to sign my name to any receipt, pay roll, voucher or other acquittance of such dues; * * * with full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in, and about the premises," with the usual ratifying and confirming clause, it does not authorize the attorney to *indorse drafts* payable to his principal or order, upon the assistant treasurer of the United States.*

The defendant, the bank, being without legal title to the drafts by means of void indorsements, acquired no title to the money received upon them, therefore, no objection can be interposed to the maintenance of an action by the payee for its recovery.

General Term, January, 1869.

THIS action was brought to recover the amount of two drafts, one for five hundred and twenty-five dollars and ten cents, and the other for nine hundred and thirty dollars and fifty-nine cents. They were in the same form. The following is the copy of one:

"No. 549. WASHINGTON, D. C., Sept. 21, 1866.

"*Assistant Treasurer of the U. S., New York*:

"Pay to George W. Holtsinger, or order, five hundred and twenty-five dollars and ten cents ($525.10).

"Paid, Oct. 2, 1866.

J. W. NICHOLLS,
"*Add. P. M. U. S. A.*"

*NOTE.—The decision in this case, seems to be strongly fortified by English and American authorities, but as an original question, we do not see how it could be sustained, if the view we take of the facts and the law in reference to it are correct.

The defendant received these drafts from one Charles H. Green, a depositor in the bank, indorsed as follows:

"Pay to the order of R. Green, Jr.;

"George W. Holtsinger;

"R. Green, Jr.;

"Charles H. Green;"

and collected the amounts from the assistant treasurer of the United States, upon whom they were drawn. It was admitted that the plaintiff had not indorsed the drafts, and that the indorsement of his name thereon was in the handwriting of one Richard Green, Jr., now deceased, whose only authority to indorse the plaintiff's name thereon, was contained in a power of attorney, which is as follows:

"Know all men by these presents: That I, George W. Holtsinger, late first lieutenant, and afterwards captain, of company F., of the fourth regiment of Tennessee infantry (volunteers), do hereby constitute and appoint Green & White, of Nashville, Tennessee, to be my true and lawful and sufficient attorneys, for me, and in my place, name and stead to ask, demand, receive, and receipt for any and all pay and allowances due me from the government of the United States, on account of my services as first lieutenant and captain of company F, of the fourth regiment of Tennessee infantry (volunteers), aforesaid, to sign my name to any receipt, payroll, voucher, or other acquittance of such dues; and for the purpose aforesaid, I do hereby grant unto my said attorneys full power to execute and deliver all needful instruments and papers, and to perform all and every act

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Here is a draft drawn on the assistant treasurer of the United States, by a paymaster of the U. S. army in favor of the plaintiff, who executed the power of attorney; and in the absence of any proof to the contrary the legal presumption must be that it was for *dues* to the plaintiff from the government of the U. S., the very subject matter which induced him to execute a power of attorney for their collection.

The attorney having received this draft for his principal, how is he to ask, demand and receive the money on it? The draft being evidence of the amount due, and authority for its collection, the attorney, instead of going personally to the assistant treasurer and presenting his power of attorney, and indorsing the name of his

and thing whatsoever requisite and necessary to be done in and about the premises, as fully and completely to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all the acts of my said attorneys, or either of them, done by virtue and in pursuance of these presents.

"In testimony whereof, I have hereunto set my hand and seal, on this fifteenth day of August, A. D., one thousand eight hundred and sixty-six, at Greenville, Tennessee.

GEORGE W. HOLTSINGER,

"*Late 1st Lieut. and Capt. Comp. F., 4th Regt. Tenn. Infantry, (Vols.).*

"Witnessed by "Robert M. McKee, "William D. Culver."

It was also admitted that Richard Green, Jr., was one of the firm of Green & White, mentioned in the foregoing power of attorney.

It was proved that the amount of the drafts, when collected by the defendant, were carried to the credit of Charles H. Green, from whom the drafts had been received for collection.

It did not appear whether the defendant had, or had not, paid the amount to their depositor.

The action was tried by a referee, who, after finding the facts, decided that the power of attorney was void, under section 1 of the act of congress of the 26th of February, 1853, and that the indorsement of the plaintiff's name was without authority, and ineffectual to transfer the drafts to Charles H. Green or to the defendant.

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principal upon the draft, and receiving the money on it, as he most assuredly would, in such case, indorses the draft and has it negotiated through a bank—the customary mode of doing such business.

Now the question arises, has the attorney the power to *indorse* this draft, and receive the money on it by virtue of his power of attorney? It would seem that this act of the attorney comes within the very terms of the power which authorizes him to *ask, demand, receive and receipt*, for any and all pay and allowances due his principal from the government of the United States, with full power to *sign the name of his principal to any receipt, payroll voucher or other acquittance* of such dues; with full power to execute and deliver *all needful instruments and papers*, &c. If the attorney

From a judgment in favor of the plaintiff, for the amount of the drafts and interest, the defendant appealed.

CHAS. P. CROSBY, *for appellant, defendant.*
O. L. STEWART, *for respondent, plaintiff.*

By the court, MONELL, J. Without examining the ground upon which the referee has placed his decision, namely, that the power of attorney to Green and White was void, under the first section of the act of congress of February 26, 1853, and therefore the defendant acquired no title to the drafts, I am so well satisfied there is another ground so fatal to the defense, that, without inquiring into the correctness of the reason given by the referee, we must affirm his decision, upon the well established rule that the court will not reverse a correct judgment, merely because an insufficient or incorrect reason may have been assigned for it.

The only claim of title to the drafts asserted by the defendant was derived through the indorsement of the payee's name by R. Green, Jr., under a power of attorney to Green and White.

It was admitted on the trial, by the defendant, that the indorsement of the plaintiff's name on the drafts was not in the handwriting of the plaintiff, but was in the handwriting of Richard Green, Jr.; and that the only authority he had to indorse the name of the plaintiff was contained in the power of attorney.

This admission must be deemed to conclude the defendant upon the facts of the case.

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has authority to ask, demand and receive all pay and allowances due his principal from the government, it is not dicovered how he can ask, demand and receive the money on this draft, which is payable to his principal, otherwise than by an indorsement thereof of the name of his principal. The power of attorney might be of little service to the principal, if this power of indorsement was not given, as undoubtedly a large share of these government dues are made payable by negotiable paper, upon which indorsements are necessary; and which indorsements are to all intents and purposes a receipt or voucher for the money. REP.

Upon those facts an objection might be taken that a power exercised by one only of two joint attorneys, was not sufficient to pass title to the drafts to the defendant.

The general rule is, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it (*Story on Agency*, § 42, *and cases cited.)* In respect to real property, it is made the subject of a public statute (1 *R. S.*, 735, § 112); and in respect to other things it is a well understood principle of the common law. In the case of *Green* agt. *Miller*, (6 *John. R.*, 39), it was held that, in a parol submission to *five* arbitrators, all must join in the award. It is there said, that in a delegation of power for a mere *private* purpose, it is necessary for all to concur. In matter of public concern a different rule prevails. That decision was before the statute (2 *R. S.*, 542, § 7), which somewhat changed the common-law rule (*Paley on Agency* [*Lloyd*], 177, *and cases cited*). In this case, however, the letter of attorney was to two persons in their copartnership name, and it may be that the signature of one of the partners of his own name, and not of the name of his firm, was a sufficient execution of the power. But as the court do not fully concur on that point, and as it is not necessary to the decision, it is left undecided.

The important question is, did the power of attorney give any authority to the attorneys to indorse the drafts?

The express power is, "to ask, demand, receive, and re ceipt for any and all pay and allowances due me from the Government of the United States, on account, &c., and to sign my name to any receipt, payroll, voucher, or other acquittance of such dues; * * * with full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," with the usual clause ratifying and confirming the acts of the attorneys.

It will be seen that the letter of attorney does not in express terms grant any power to indorse the plaintiff's name upon any draft; and unless such power can be derived from those parts of the instrument which confer what may be called general power, it nowhere exists.

The case of *Hogg* agt. *Smith*, (1 *Taunt.*, 347) was very similar to this case. The plaintiff, by power of attorney, constituted one English, his attorney, to "ask, demand, recover and receive, from the commissioners of his majesty's navy, all such salary, wages, &c., as there was or thereafter should be due to him, for his services in any of his majesty's ships, * * and acquittances, releases and other discharges" in his name to make, with the usual clause of general ratification and of general power in the premises. English received from the commissioners of his majasty's navy, on account of the plaintiff, two bills, payable to the plaintiff's order. English indorsed the drafts in the plaintiff's name, and negotiated them to the defendant. The action was *trover*, and it was held that the authority was strictly confined to receiving the debt; that the attorney, by receiving the bills, performed all that he was authorized to do, and ought to have kept them in his possession for the plaintiff.

The case of *Hay* agt. *Goldsmidt*, (*cited by* LAWRENCE, J., *in Hogg* agt. *Smith*, *supra*) was also similar. There was a power of attorney to ask, demand, and receive from the East India company all moneys that might be due, &c., and *to transact all business*, with the usual general power and clause of ratification. The attorney received an India bill payable to the plaintiff's order, indorsed it in his name, procured it to be discounted by the defendants, who received of the India company the money due on the bill. The action was to recover the money, and the court was of opinion that the instrument gave no authority to the attorney to indorse the bill, and that the words "all business"

must be confined to all business necessary for the receipt of the money.

In *Gardner* agt. *Baillie*, (6 *T. R.*, 591), the attorney had accepted a bill for and in the name of the defendant as executrix, for a debt due to the plaintiff from the defendant's testator. The letter of attorney authorized her attorney to "adjust and settle all accounts, differences," &c., wherein she, as executrix, was interested; and for her and in her name, as executrix, to execute assignments of mortgages, receipts releases, &c.; *to pay all debts* due from her as executrix, and "*generally to do all such further acts* for recovering debts and discharging the power given by the letter." It was held that there was no authority to accept the bill. In *Rossiter* agt. *Rossiter*, (8 *Wend.*, 494), a promissory note was made by an attorney, in the name of his principal, to release certain pledged property. The letter after giving special power to the attorney also empowered him "to accomplish at his discretion, a complete adjustment of all the concerns of Pynchon, and to do any and every act in his name which he could do in person." The court held that the attorney was a special agent; that the letter specified what business he was to transact, and that the general authority "to accomplish, at his discretion," &c., conferred no power that did not relate to the business previously mentioned. The cases of *Hogg* agt. *Smith*, and *Hay* agt. *Goldsmidt*, were cited and approved.

The general rule for the interpretation of this species of written instruments is, that language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to such matter, and will be limited accordingly. Such instruments are always subjected to a strict interpretation, and will not be extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into effect (*Ferreira* agt. *Depew*, 17 *How. Pr. R.*, 418).

The cases I have cited are sufficient to show that the general words in a letter of attorney cannot be construed to extend or enlarge the power beyond the subject matter of the agency, as expressed in the previous parts of the letter.

There being therefore no express authority to indorse the drafts, none can be implied from other parts of the letter.

The defendant being without legal title to the drafts, acquired no title to the money received upon them, and I can see no objection to the maintenance of an action by the payee for its recovery.

In *Hogg* agt. *Smith*, (*supra*) the action was *trover*, to recover for the conversion of the bills; and in *Hay* agt. *Goldsmidt* (*supra*), for the recovery of the amount of money received on the bill. In each case the action was against a person to whom the bills had been transferred for value.

In this case, the defendant was the collecting agent of its depositor, had parted with no value, and was, in fact, the mere custodian of the money, having no interest whatever, which under other circumstances, it might, perhaps, ask to have protection.

But, if the English cases were not sufficient to sustain this judgment, one or two in our own courts can be brought to their aid.

In the case of *Canal Bank* agt. *Bank of Albany* (1 *Hill.*, 287), a draft drawn upon the plaintiff was sent to the defendant for collection, with the payee's name *forged*, and they received the money. It was held that the defendant was bound to refund to the drawees who had paid the draft.

A similar case is *Coggill* agt. *American Exchange Bank*, (1 *N. Y. R.*, 113), where the payment by the drawees was also after a forged indorsement, and the amount was recovered. And see *Goddard* agt. *Merchants' Bank*, (4 *N. Y. R.*, 147).

In each of these cases the defendant was the collecting agent, and received the money on account of its immediate correspondent and indorser; and they are cited to show that the mere agency of the defendant in the matter, did not protect them from an action for money which they had received without legal authority from the payee of the drafts.

The principle decided in *Easton* agt. *Clark*, (35 *N. Y. R.*, 225), is, I think, also applicable to this case. It is, that property disposed of by a factor, in a manner not within the scope of his authority, may be reclaimed by the owner, on the ground that no title passes, either in *replevin* or *trover*, or he may waive the *tort* and recover the proceeds of the sale.

It not appearing in this case that the defendant has paid over to its depositor the money received on the drafts, it must be assumed that it remains in their hands, and therefore it is a matter of indifference to them which party receives it.

I have reached the conclusion in this case, that the defense is unsound with some reluctance, inasmuch as the points I have considered were not much discussed on the argument; but the reasons I have stated are founded wholly on *facts* which cannot be changed; and the most that can be complained of, is, that the appellants have not had another opportunity to argue them.

I am of opinion that the judgment should be affirmed.

FITHIAN, J. The cause of action in this case is, that defendant having innocently, but without authority or assent of the owner, become possessed of plaintiff's property (the drafts in suit); and having, through the unauthorized use of plaintiff's name, converted the same into money, which it refused to pay to plaintiff, the law gives the latter a right of action as for money had and received to his use. I think the action is clearly maintainable in such a case.

I concur in the opinion of the court affirming the judgment in this case, on the ground solely that the power of attorney is not sufficiently broad and comprehensive to authorize the attorney to sign or indorse plaintiff's name to any bill, draft or note. The attorney was a special agent for one single purpose, and when he had received and receipted for the drafts or "warrants" specified, he had executed his power, and his authority as agent *terminated*. He held the drafts precisely as he would have held money if he had received that instead of the bills from the United States officer, viz., as the property of plaintiff, with no power or right of disposition whatever, save to pay over to plaintiff.

On the question whether in this case the power of attorney could be legally executed by one of the two join attorneys, *alone*, I express no opinion.

The grounds upon which we put our decision in this case renders it unecessary to inquire whether the power of attorney was void by reason of its not being executed within the time required by the act of Congress of February 26, 1853.

However, as the referee based his decision solely upon that ground, and the question was much discussed on the argument, it may not be inappropriate to state briefly my conclusions on that subject. I am of opinion that the provisions of the statute above mentioned are not intended to apply to *all* powers of attorney, but only to such as are irrevocable and work an assignment to the attorney of an interest in the claim or its proceeds; or in other words, powers coupled with an interest—for it is such only that are within the mischief sought to be remedied (6 *Opinions Attorney-General, p.* 50); and that a simple power or authority to an agent to collect and receive money on a demand against the government, in which the agent has no interest whatever, is not within the provisions of the first section of the act of 1853, provided it be executed in accordance with

the requirements of the act of 1846 on that subject. I am also of opinion that as to such powers as are void within the provisions of the act of 1853, they are so only as between the claimant and the government; that is, the officers of the government are authorized to disregard the power and treat it as a void instrument. If, however, the officers of the United States choose to so far recognize the power as to pay over to the agent money or property on account of the claim, the claimant has his election to repudiate the act as no lawful payment, and still assert his claim—or he may ratify the act of payment, and pursue his money or property into the hands of his agent, or other persons to whom the agent may have delivered the same. If he does the latter, he is subject to, and bound by all and every power of disposition or interference with the fund which he may have given, and which is valid at common-law. The United States statute was not intended to affirm or avoid contracts between citizens, except so far as it affects the relations of the *government* with its citizens. Had the power of attorney in this case been sufficient at common-law to authorize the agent to *indorse bills*, the judgment must have been reversed. As it is, judgment is affirmed.

JONES, J., concurred.

SUPREME COURT.

CHRISTOPHER C. CHAMPLIN agt. WILLIAM DEITZ.

Where the complaint alleged a cause of action for a certain quantity of hay sold, at an agreed price per ton; also for a balance due—specifying the sum, for personal property sold; also for moneys paid out for the benefit of the defendant, and at his request, in a specified sum; also for work, labor and services done and per for the defendant, for which defendant agreed to pay as much as they were reasonably worth, that said services were reasonably worth a specified sum:

Held, the *summons* being issued under the 2d subdivision of § 129 of the Code for relief, that the *complaint be dismissed with costs*, for the reason that it disagreed with the summons. With the privilege to the plaintiff, on payment of said costs to amend his summons.

Sixth District, Chenango Special Term, February, 1869.

Before RANSOM BALCOM, *Justice.*

MOTION to set aside the complaint, on the ground that it does not conform to the summons. The complaint joined several causes of action, each for specific amounts, and one count for work and labor, claiming on a *quantum meruit.*

D. L. ATKYNS *for the motion.*

I. Subdivision 1 of § 129 of the Code, does not apply when subdivision 1 of § 246 does not, and *vice versa.*

A summons for money cannot be used, except, when on failure to answer, the plaintiff must apply to the clerk for judgment; these subdivisions are reciprocal.

II. It is proper to join in one complaint different causes of action all arising on contract, e. g. on a promissory note, and for a failure to perform a contract when the damages are unliquidated, (*Code*, § 167, *subdivision* 2; *Norton* agt. *Cary*, 23 *How.*, 469).

III. Subdivisions 1 of §§ 129, 246, are to be interpreted restrictively. To grant a broad construction of them would

be to establish a new judicial tribunal uncontemplated by our legislators. The county clerk would come to be a judicial officer second only to the supreme court judge. (*Flynn* agt. *The Hudson River Railroad Company*, 6 *How.*, 305).

IV. The design of subdivisions 1, of §§ 129, 246 is, that where the damages are fixed and certain, or can be rendered so by a simple arithmetical computation, then a summons for money *may* be used (29 *How.*, 385) as where the action is on a note, bond, account stated, &c. But where the contract itself does not fix the measure of damages, or the amount claimed, in all such cases, application must be made to the court for judgment on failure to answer.

The summons must be for relief and the judgment for the relief demanded in the complaint. (*Garrison* agt. *Carr*, 34 *How.*, 187; *Hemson* agt. *Decker*, 29 *Id.*, 385; *Tuttle* agt. *Smith* 14 *Id.*, 395; *Cobb* agt. *Dunkin*, 19 *Id.*, 164; *The Cemetery Board of the Town of Hyde Park* agt. *Tuttle* 8 *Id.*, 504; *Flynn* agt. *The Hudson River Railroad Company*, 6 *Id.*, 310; *Norton* agt. *Cary*, 23 *Id.*, 469.

CHAS. A. FULLER, *opposed.*

I. This summons should have been under subdivision 1 of § 128 of the Code, which provides: 1. "In an action arising on *contract for the recovery of money only*, that he will take judgment for the sum, &c."

"The two subdivisions of this section (129) are intended to represent the two classes into which actions were divided before the Code. Actions *ex contractu* and actions *ex delicto*. The words arising on contract in subdivision 1, are obviously intended merely as a translation of, and substitute for the old Latin phrase, *ex contractu*. They extend to, and include *implied* as well as *express* contracts." (BIRDSEYE, J, *People* agt. *Bennett*, 6 *Abb.*, 345.)

An *implied contract*, may be for "the payment of money only" and is as much the mutual agreement of the parties, *and is equally binding upon them, as if express.* (2 *Black. Com.*, 443; *Ogden* agt. *Saunders*, 12 *Wheat.*, 341; 1 *Story Com.*, §§ 11 *and* 12, 4th *ed.*).

"The notice in the summons should be in form of subdision 1, where the action is brought for the recovery of money only when payable by the terms of the contract, whether *express* or *implied*, even if no more than a legal duty or liability imposed by statute, or declared by judgment of a court; or 2d when the sum sued for is certain in amount, or capable of being reduced to certainty by computation from the terms of the contract." (*People* agt. *Bennett*, 6 *Abb.*, 349; *Tuttle* agt. *Smith*, 6 *Abb.*, 339; *Tuttle* agt. *Smith*, 14 *How. Pr.*, 395; *Davis* agt. *Balis*, 6 *Abb.*, 15; *Cobb* agt. *Dunkin*, 19 *How.*, 193; *Croden* agt. *Drew*, 3 *Duer*, 652; *Campbell* agt. *Wright*, 21 *How.*, 9;)

People agt. *Bennett*, sustained by Justices' EMOTT, S. B. STRONG, BIRDSEYE, DAVIS, T. R. STRONG, HARRIS, GOULD, HOGEBOOM, T. A. JOHNSON, BALCOM, E. D. SMITH, J. R. BRADY. (2 *Till* agt. *Shear.*, *N. Y. Pr.*, 358.)

Hemson agt. *Decker* (29 *How.*, 385), really holds no further than that when the summons is for relief, and the complaint shows matter calling for relief, and that application must be made to the court therefor, the complaint is not made to vary from the summons by asking for a certain sum of money, and for such other relief as the court thinks proper. *The facts stated were right. A portion of the demand for judgment, wrong.*

II. No question of dispute arises, except upon the fourth count of the complaint. It will not be contended that a sale of goods at an *agreed price*, calls for a summons for relief, in an action for the price.

I cannot conceive upon what theory it can be claimed that in an action on a *quantum meruit* for labor, a relief summons is proper. The plaintiff alleges the services *worth so*

much. The defendant may take issue thereon, that is upon the value alone. *A failure to do so admits the value as alleged by the plaintiff,* and judgment may be entered without any assessment by the court. *Whereas in an action for unliquidated damages the defendant can take no issue on the amount of damages, and by failure to answer does not admit them as alleged.* (12 *Abb.*, 448; 35 *Barb.*, 514; 12 *Abb.*, 343 *Gregory* agt. *Wright,* 11 *Abb.*, 417.)

The true test by which to determine whether the summons should be under subdivision 1 or 2 of section 129, is "whether an answer disputing the *amount* due, without denying that *something* was due, would be good." If answered affirmatively, then the action is for debt, and not for damages, and judgment on failure to answer, is to be entered on application to clerk. (2 *Till. and Shear. Pr.*, 252; *Davis* agt. *Bates,* 6 *Abb. Pr.*, 15; *Diblee* agt. *Mason,* 1 *Code R.* 37.)

III. The argument that such variations are harmless should not be listened to. The defendant would be called to pay $10 more costs under this summons. Besides it is important that the two classes of actions be kept distinct. The defendant has a right to know where application for judgment will be made, should he neither demand copy complaint, nor answer.

In England by "The Uniformity of Process Act," 2 *W. 4 ch.*, 39, five different forms of process issue. (3 *Chit. Pr.*, 158.)

a. "The declaration must correspond with the form of action specified in the writ, and if the declaration is in a different form of action, it is irregular and the court will set it aside, leaving the plaintiff to declare on the writ, if he can do so, according to his cause of action." (*Thompson* agt. *Dicas,* 1 *Cromp. and M.* 768; *Ward* agt. *Turner,* 1 *A. and E.*, 619; 3 *Tyr.*, 873; 3 *Chit. Pr.*, 159, 195, 197.)

b. And the court says "It is better to compel suitors to adhere to the strict form, for otherwise the court would al-

waye be discussing what deviation was allowable." (*Edwards* agt. *Digan*, 2 *Dowl.*, 240; *King* agt. *Shiffington*, 1 *Cromp. and M.*, 363; 3 *Chit. Gen. Pr.*, 71, 197.)

c. "Infinite mischief has been produced by the facility of the courts in overruling errors in form, thereby encouraging carlessness and placing ignorance too much on a footing with knowledge. (EYRE *Ch. J. Morgan* agt. *Sargent*, 1 *Bos. and Pul.*, 59.)

"Permitting such deviation pays a bounty on negligence." (*Ld.* LYNDHURST, *Rex* agt. *Calvert*, 2 *Cromp. and M.*, 190; 3 *Chit. Pr.*, 69.)

The complaint should be dismissed with costs.

E. H. PRINDLE, *counsel for plaintiff.*

Argued at length that defendant was not hurt by the variance, if any, and that the count for the reasonable worth of plaintiff's services, called for application to the court for judgment. He cited *Cobb* agt. *Dunkin* (19 *How.*, 193), *Campbell* agt. *Wright* (29 *How.*, 385, *and* 14 *Abb.*, 364, 23 *How.*, 469).

SUPREME COURT—COUNTY OF CHENANGO.

CHRISTOPHER C. CHAMPLIN
agt.
WILLIAM DEITZ.

Summons for Relief—Complaint filed.

To William Deitz, defendant.

You are hereby summoned to answer the complaint of Christopher C. Champlin, plaintiff, which will be filed in the office of the clerk of Chenango county, and to serve a copy of your answer on the subscriber at his office, in the village of Sherburne, N. Y., within twenty days after the service of this summons, exclusive of the day of service, *or the plain-*

tiff will apply to the court for the relief demanded in the complaint.

C. A. FULLER,
Plaintiff's Attorney.

Dec. 9, 1868.

Copy.

SUPREME COURT—CHENANGO COUNTY.

CHRISTOPHER CHAMPLIN
agt.
WILLIAM DIETZ.

Complaint.

The plaintiff complains of the defendant and alleges the following facts constituting his cause of action:

1. That sometime in the year 1864, the said plaintiff sold to said defendant, and delivered the same at plaintiff's barn, 11,320 pounds of hay, *at the agreed price* of $11.00 per 2000 pounds, that said defendant has never paid for said hay, excepting the sum of $22.30, paid on account of it.

2. That said defendant is indebted to said plaintiff *on a balance of* $3.25 *on a pair of boots sold and delivered to said defendant.*

3. That said defendant is further indebted to said plaintiff on *account of moneys paid out by said plaintiff for the benefit of said defendant, and at his request in the sum of* $1.50.

4. That said defendant is indebted to said plaintiff for work, labor and services, done and performed for said defendant at his request, at different times within the last year, for which said services said defendant *agreed to pay said plaintiff as much as they were worth; that said services were reasonably worth* $14.00.

5. That the said defendant is further indebted to said plaintiff for 8,182 pounds of hay, sold and delivered to said defendant, at said plaintiff's barn, at the *agreed price of* $14.00 per 2000 pounds, said defendant having paid but $22.00 on said purchase.

Wherefore plaintiff demands judgment against said defendant *for the sum of* $100.00 *with interest* on said demand from the date payment on them was due, with the costs of this action.

C. A. FULLER,
Plaintiff's Attorney.

Chenango County, ss.:
Christopher C. Champlin, the plaintiff in this action, being duly sworn, says: the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

Sworn to, before me, this 18th day of December, 1868.

H. BRIGGS,
Justice of the Peace.

IN THE SUPREME COURT OF CHENANGO COUNTY.

CHRISTOPHER C. CHAMPLIN
agt.
WILLIAM DEITZ.
} *Notice of motion.*

SIR:—Please to take notice that upon the summons and complaint in this action, or copies thereof, and upon the affidavit of William Deitz, a copy whereof will be hereafter served on you, a motion will be made at the next special term of this court, appointed to be held at the court house, in the village of Norwich, in and for the county of Chenango, on the third Monday in February, 1869, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order, that the plaintiff's complaint herein, be dimissed with costs, upon the ground of the following irregularity, viz:

1st. That the complaint disagrees with the summons herein.

2d. That the summons is for relief, under subdivision two of section one hundred and twenty-nine of the N. Y. Code, and that the complaint is for money, under subdivision one of the same section.

3d. That the complaint disagrees with the summons in this, to wit: that the summons is for relief, and the complaint for money—or for such other and further order and relief in the premises as shall be equitable and just.

Dated this 14th January, 1869. Yours, &c.

D. L. ATKYNS, *attorney for defendant,*

To CHARLES A. FULLER, Esq., *attorney for plaintiff.*

At a special term of the supreme court, held in and for the county of Chenango, at the court house in the village of Norwich, on the 15 of February, 1869.

Present:—Hon. RANSOM BALCOM, *Justice.*

CHRISTOPHER C. CHAMPLIN.
agt.
WILLIAM DEITZ.

On reading and filing affidavit of William Deitz, the defendant herein, and notice of motion, that the complaint herein be dismissed with costs, for the reason that it disagrees with the summons, and after hearing Mr. Atkyns for the motion, and E. H. Prindle of counsel for the plaintiff in opposition thereto:

Ordered that the said motion be, and the same is hereby granted with ten dollars costs.

And it is further ordered, that on the payment of the said costs, the plaintiff may, within ten days after service of a copy of this order, amend his summons herein, and that if such amendment is made, the defendant may have ten days after the service of a copy thereof, in which to answer the complaint herein.

No written opinion was given.

N. Y. SUPERIOR COURT.

ANDREW L. IRELAND, respondent agt. WILLIAM H. NICHOLS *et. al.*, appellants.

A *receiver* may be appointed in an action for the recovery of possession of real estate, and damages for the withholding of the same. *(This is adverse to Thompson* agt. *Sherrard*, 35 *Barb.*, 593.)

Where the plaintiff prosecutes his action for the possession of premises, on the ground that the premises have been *sub-let* by the lessee contrary to the terms of the lease, thereby involving a *forfeiture* of the lease, he does not waive this legal cause of action by claiming the equitable relief of the appointment of the receiver, to receive the rents and profits of the premises and to prevent waste during the remainder of the term.

February General Term, 1869.

Before BARBOUR, *cheif justice*, MCCUNN & FITHIAN, *J.J.*

THIS is an action to recover possession of real property. The complaint alleges that plaintiff being the owner of the premises, leased the same for a term of years to the defendant Nichols by lease, with covenants against under-letting, unless by the consent in writing of the lessor. That defendant under-let the whole to the other defendants without any permission whatever of his landlord. Whereupon he demands judgment of forfeiture of the lease and delivery of possession of the premises and damages for the withholding thereof in double the value of the use and occupation.

The defendant in his answer admits the under-letting, but alleges that plaintiff had waived the forfeiture by accepting rent after and with the knowledge of the sub-letting. Thereupon, upon the pleadings and affidavits showing all the defendants to be irresponsible, and that defendant Nichols had threatened waste in the premises by removing water pipes, &c., and that the rents and profits were in danger of being lost, &c., the plaintiff moved the court at special term

for the appointment of a receiver of the rents and profits of the premises pending this litigation.

The justice at special term granted the motion and appointed a receiver—from this order defendant appeals.

D. P. WALDEN, *for defendant, appellant.*

This is an action of ejectment brought by a landlord claiming a forfeiture of his tenant's lease by reason of a breach of contract.

The action is against the tenant and the under tenants in possession.

The order is for the appointment of a receiver to collect the rents from the under tenants during the litigation, and an injunction against the lessee.

The defendant's answer denies that he is unlawfully withholding possession, and avers an affirmance of the lease, and a waiver of the forfeiture on the part of the landlord.

The order was granted December, 1868.

I. A receiver will not be appointed in an action of ejectment; it is not consistent with the nature of the action and the relief sought, or with the provisions of the Revised Statutes, (2 *R. S.*, 309, §§ 36, 37, 38,) declaring and restricting the force and effect of judgments in such actions, even as between the parties. (*Thompson* agt. *Sherrard*, 12 *Abb., R.*, 427; *Per* SUTHERLAND, *J.*,432, *S.C.* 35 *Barb.*, 593 594; *See also Cofer* agt. *Eckerson*, 6 *Iowa*, (*Clarke*), 502; *Per* UNDERWOOD, *J.*, *p.* 504.)

The case of *People and Taylor* agt. *The Mayor*, (10 *Abb.*, 111), was decided in 1858, prior to case of *Thompson* agt. *Sherrard*, and in that case the order appointing the receiver was reversed.

II. A receiver will not be appointed in such action where it is brought against both the tenant and sub-tenants; for the collection of the rents from the sub-tenants would be a

recognition of the principal defendant's right to lease the land.

You cannot collect rent of the sub-tenants and at the same time declare them trespassers. (*The People* agt. *Mayor*, 10 *Abb.*, 115; *Per* MULLIN, *J.*)

III. The appointment of a receiver could only be upon the theory that if the plaintiff recovered, he would be entitled to the precise rents payable by the tenants as damages; this is not so; the claim is for *mesne profits*, and it is against the defendants as trespassers. (SUTHERLAND, *J.*, 432, 433.)

IV. The case does not "*establish an apparent right to the property*" in the plaintiff.

The defendant shows an affirmance of the tenancy after the under-letting, and that the forfeiture was waived by the receipt of rent subsequently accruing, which rent was received with full knowledge. (1 *Sand.*, 287, *d.*; *Bleecker* agt. *Smith*, 13 *Wend.*, 530; *Hunter* agt. *Osterhoudt*, 11 *Barb.*, 33; *Manice* agt. *Millen*, 26 *Barb.*, 41; *Keeler* agt. *Davis*, 5 *Duer*, 507.)

Where the legal title in the plaintiff is doubtful, a court of equity will not appoint a receiver. (1 *Barb., Ch. Pr.*, 655; 1 *Van Santvoord Eq. Pr.*, 385, 386; *Edwards on Receivers*, 364; 2 *Story Eq. Juris.*, § 828.)

V. This application is addressed to the equitable powers of this court: those rights which the court exercises as a court of chancery. (*Folsom* agt. *Evans*, 5 *Minnesota R.*, 418.)

And it is an anomaly that a court of equity should be appealed to, to assist a plaintiff in his efforts to take advantage of a forfeiture.

Equity abhors forfeitures, and always relieves against them, when possible to do so; and a lessor cannot, in an action where he seeks to forfeit a lease, have any equitable relief; the claim of forfeiture is totally inconsistent with any

equitable relief. (*Linden* agt. *Hepburn*, 3 *Sandf.*, 668; *Pr.* SANDFORD, *J.*, 670, *&c.*)

VI. There is not the least pretence of equity on the part of the plaintiff, and his moving papers show that he is not entitled to any consideration.

1. The affidavit of the agent shows, that from the first he knew that the house was sub-let by the defendant, that he was told from time to time that the defendant could not get his rent from his sub-tenants, and notwithstanding this, he received the rent.

2. That the defendant's ability to pay has not been heretofore questioned, on the contrary, he has paid his rent in full, and defendant shows that he has paid up to November 1, 1868.

3. The plaintiff, through his agent, was so well satisfied with defendant's responsibility, that he was willing to give him a new lease at an advanced rent.

4. The whole proceeding is an unjust attempt to take advantage of a printed clause in the lease, inconsistent with the object of the letting and the intentions of both parties, and is now resorted to for the purpose of extorting more rent from the defendant.

5. The forfeiture, if any, has been waived.

VII. The plaintiff should not be assisted in any way by the equitable powers of the court, if by a strict, hard, legal action, he can recover possession, he must do so—but he should be left to his strict legal rights.

VIII. The order should be reversed with costs.

IRA D. WARREN, *for plaintiff, respondent.*

This is an action brought to recover possession of a house and lot leased by the plaintiff to the defendant, Nichols, for the violation of a covenant or condition on the part of the lessee not to "under-let the whole or any portion of the premises without the written consent of the landlord."

The defendant Nichols, underlet the whole premises to different parties, *and left the premises himself.*

The under-letting without the landlord's consent is admitted by the answer, and he alleges that the plaintiff waived a forfeiture.

The plaintiff made a motion on the complaint and answer, and an affidavit showing that the defendant Nichols, is insolvent, and that plaintiff will lose the rent if Nichols is allowed to receive it during the pendency of the suit, asking that a receiver be appointed to collect and receive the rent of the premises from the various tenants in possession of the premises.

The defendant Nichols does not occupy any portion of the premises.

The court below granted the motion, and appointed Andrew J. Smith receiver, and from the order appointing the receiver this appeal is taken.

I. This is an action to recover possession of a piece of real estate. The Code provides that a receiver may be appointed.

"*Before judgment*, on the applisation of either party, when he establishes an apparent right to property which is in possession of an adverse party, and the property, *or its rents and profits*, are in danger of being lost or materially injured or impaired, except in cases where judgment upon failure to answer be had without application to the court." (*Code* § 244, *subdivision* 1.)

This case is not included in the exception mentioned in this subdivision. We do establish our right to the property which is the subject of the action, fully and *beyond question.*

He admits that he underlet, without the consent of the landlord: this is enough to entitle the plaintiff to recover. (*Lawrence* agt. *Williams*, 1 *Duer*, 585; 2 *Blackstone*, 247, 274; 4 *Kent*, 113; *Burrill's Law Dic. vol.* 1, *page* 507, *title Forfeiture.*)

He alleges, however, that the landlord's agent, with full knowledge of the fact, received rent up to the 1st of November, 1868, when he refused to receive any more.

This was a continuing breach of this covenant against under-letting, and even if the landlord received rent until November 1st, as alleged, yet he had a right to commence his action on the 9th of November for a breach.

"Receiving rent to the first day of November would validate the lease up to that time, but will not operate as a waiver of a forfeiture incurred by *continuing* the original cause of the forfeiture after the day on which the rent received fell due." (*Jackson* agt. *Allen*, 3 *Cowen*, 221; *Bleecker* agt. *Smith*, 13 *Wend.*, 530.

We therefore show not only *an apparent right* to the property in suit, but an *absolute right.*

We show by affidavit, that the *rents and profits are in danger of being lost*, and that the premises are "in danger of being materially injured and impaired" by his removing gas-fixtures and water-pipes, &c.

We say, therefore, that we are within the exact language of this section of the Code, and are entitled to a receiver.

II. In this case the defendant, Nichols, is not in possession of any part of the premises.

The receiver is therefore to collect only the rent of the sub-tenants. The landlord, Nichols, is alone served with process. The question has been decided by the supreme court, general term, in this district, holding that where it appeared that the tenant was insolvent, a receiver would be appointed. (*Tillinghast's and Sherman's Practice, vol.* 1, 738; 8 *Abbott's Practice R.*, 7; *The People and Taylor* agt. *The Mayor*, 10 *Abb.*, 111.)

There is a marked distinction between the case at bar and the case of *Thompson* agt. *Sherrard.* In that case the action was against the lessee, he being *personally* in possession of the premises.

In that case the receiver would be obliged to fix the amount the defendant must pay, and his own *occupation* could not, within this section of the Code, be considered "*rents and profits.*"

That is entirely a different case from this, as Nichols occupies no part of these premises, and the appointment of a receiver affirms nothing as to him.

Judge SUTHERLAND'S opinion seems to be based on the fact that this is an action of ejectment, and therefore under the Revised Statutes, if the plaintiff succeeds the defendant may have the judgment vacated and a new trial, and therefore another receiver may be appointed.

I cannot see how this reasoning can affect a parties rights to a receiver; he has established an apparent right to the property, and under the Code is entitled to have the rents and issue protected.

There is no such thing as an action of ejectment now. The party states the facts and the court grants all the relief the plaintiff is entitled to, both legal and equitable.

The *mesne profits* is the rent of the premise, if re-let, or their value if occupied by the party himself.

Old forms of action and all the old names of actions were supposed to have been consigned to everlasting oblivion by the Code, except as some judicial antiquarian should at some future day unearth them as curiosities to illustrate the curious phases of the human mind in the days, when, with all their absurd technicalities they were considered the perfection of human reason.

Now a party states his facts, and on these facts he can ask the court for any relief to which he is entitled, whether legal or equitable. It is hardly safe to now determine what that relief is by the dim shadows of old names, and old forms, long since abolished. The learned judge who decided that case, was wrong however in assuming that no receiver could be appointed in such an action, to recover the possession of real estate, before the Code.

It is true parties then had to resort to the court of chancery in order to obtain a receiver. We are in a court of chancery, and whatever relief the facts warrant we are entitled to. (*Willis* agt. *Corlies*, 2 *Edwards Ch.*, 281; *Payne* agt. *Atterbury*, *Harrington's Ch.*, 414; *Botlem* agt. *Wood*, 2 *Jac. and W.*, 236.)

Where the fund was in danger by the insolvency of a party, a receiver was always appointed. (*Barbour's Ch. Practice, vol.* 1, 665; *Tillinghast's and Sherman's Practice, vol.* 1, 738; *Talbot* agt. *Scott*, 4 *Kay and Johns.*, 111; *Tree* agt. *Hinde*, 6 *Mad. Ch. R.*, 7.)

It seems the height of absurdity, where a landlord has leased a house to a tenant who is, or becomes, insolvent, and who has forfeited his lease, or whose lease has terminated for any other reason, to hold that that insolvent tenant can go on collecting the rents of the premises which belong to the landlord, until the landlord can get his case heard and decided by the courts on a trial, and that, too, in a case where he will lose his whole rent so collected by the tenant.

This section of the Code, if it means anything, applies to just such a case as this.

III. The defendant, Nichols, threatens to remove the croton water pipe and gas pipes. This act alone is enough to justify a receiver on the other ground mentioned in this section of the Code, that the property will be "*materially injured.*"

This ground has been held sufficient, independent of this provision of the Code. (*Talbot* agt. *Scott, Kay and Johns.*, 133, 126.)

IV. We ask that this order be affirmed with costs.

By the court. FITHIAN, J. I am of opinion that on the application for the appointment of a receiver, the plaintiff established a sufficient "apparent right to profits" to entitle him to a receiver, provided this be a case in which a receiver can be appointed at all. The plaintiff's title is admitted,

and the alleged acts of forfeiture are admitted. The defense consisting of affirmative allegations of waiver. Upon the pleadings on the trial, plaintiff would be entitled to rest without proof, and demand judgment in his favor, unless defendant could affirmatively show a defense; certainly no mere "apparent right" could be shown in any case where was an issue of fact. So if this is a case where a receiver can be appointed *at all* the discretion of the justice appointing in respect to whether under all the circumstances of the case it was just and equitable to appoint one, should not be interfered with.

The first question to be determined here, is whether a receiver can be legally appointed in an action for the recovery of the possession of real estate, and damages for the withholding of the same.

It is claimed, and authorities are cited to sustain it, that a receiver could never be appointed in a purely legal action. That such an officer could be nominated only in actions of equitable cognizance. This was true before the Code. A receiver and an injunction were remedies or instrumentalities pertaining exclusively to courts of equity. Now, however, both legal and equitable jurisdiction are vested in the same courts and officers. And all distinctions between legal and equitable actions (as it regards forms) are abolished.

The legislature could not of course destroy the essential distinctions between legal and equitable principles. But it can, and has to a very considerable extent permitted both legal and equitable principles to be asserted and invoked in one and the same cause of action; and many of the remedies which before the Code pertained exclusively to actions brought to assert purely equitable rights and remedies, are now made applicable generally to actions of legal as well as equitable cognizance. Indeed it could hardly be otherwise, as we now have but one form of action, in which to assert all remedies known to the laws and the courts.

It seems to be the design of the Code, as far as practicable, to make those formerly distinct remedies, common to all actions where the facts bring the case within the provisions of the statute, but particularly so in respect to those remedies designated "provisional" in the language of section 244 of the Code, which is very clear, explicit and unequivocal. A receiver *may* be appointed before judgment in any action; and "on application of either party, who establishes an apparent right to property which is the *subject of the action*, and which is in the possession of the adverse party, and the property, or its *rents and profits*, are in danger of being lost or materially injured, or impaired." This language is broad and general. It is impossible without interpolating qualifying words into the statute, to restrict the power of appointment to any particular kind of action or relief. It applies to all and every action where property (of any kind) is the aubject. And the express mention of "rents and profits," shows that real "property" was intended to be included. I do not therefore understand that the supreme court in the case of *Thompson* agt. *Sherrard, et al.* (35 *Barb.*, 593), intended to question the power of the court to appoint a a receiver of rents and profits, *pendente lite*, in an action for the recovery of real estate, but intended only to deny the propriety and regularity of such appointment in such cases. With all respect for the learned judge who delivered the opinion in that case, I am unable to concur in the decision. It is said that such an order is "inconsistent with the nature of the action and the relief sought." In my opinion the *statute* has determined that matter, and has declared that the appointment of a receiver is consistent with the nature of such an action. The action is for the recovery of real property alleged to be wrongfully withheld from the plaintiff, and as an incident to his recovery (if he should succeed) the law awards him certain moneys, which have been called the damages which plaintiff has sustained by reason of the withholding of his property, but the measure of these dam-

ages is as fixed and certain as it would be in a civil action for use and occupation of premises.

The statute provides that a plaintiff recovering in ejectment "shall also be entitled to recover *damages* for the *rents and profits* of the premises recovered," and in case of a separate action for such rents and profits, the statute is that the "jury shall assess plaintiff's damages to the amount of the mesne profits received by the defendant since he entered into possession of the premises."

Now in this case we have a tenement house which plaintiff claims to be wrongfully withheld from him by the defendants, and the possession of which he seeks to recover.

The "rents and profits," or "mesne profits," of those premises are just what those defendants *ought* to pay for use and occupation during the time of the wrongful withholding, and what they have agreed among themselves to be a fair price for such use and occupation, certainly ought to fix the "rents and profits" and "measure" of plaintiff's damages, at least as against the defendants themselves, and these rents and profits at the lowest; the law gives the plaintiff an *absolute right* to recover in case he succeeds. The plaintiff here shows an "*apparent* right to the property and shows that *all* the defendants are insolvent, and consequently that these "rents and profits" to which he is entitled, if he recovers, "are in danger of being wholly lost."

He brings himself within the express language of the Code. And I see no impropriety in the court appointing an officer to take and hold these "mesne profits" during the litigation, to be eventually paid to the prevailing party. Aside from *Nichols* none of the defendants could complain, for it is immaterial to whom they pay, so as they are protected in payment, and Nichols should not be heard to complain, for if he succeeds he will take the "rents and profits from the receiver, while if he fails he has no right (being insolvent) to put the plaintiff in peril of losing the "mesne profits."

The objection as to what is to become of the "rents" in the hands of the receiver during the *three* years in which the defendant (if defeated on the first trial) has to demand another trial, seems to me to have no force. Suppose no receiver is appointed and the *plaintiff* has a verdict. In such case, if defendant does *not at once* demand a new trial and stay plaintiff's proceedings, a writ of possession would issue to put plaintiff in possession, and he would then take and hold the "rents and profits" during the subsequent litigation which would certainly be as bad for the defendants as to have a *receiver* hold them.

The remaining question in the case, is as to the effect of the plaintiff's application for a receiver of "rents" upon his right of action for a forfeiture? It is claimed by defendant's counsel, that the plaintiff's cause of action being founded solely upon the alleged wrongful act of such defendant in *sub-letting* these premises, if the plaintiff, now through a receiver, seeks to collect and hold the rents agreed to be paid by the sub-tenants, that would be tantamount to a satisfaction and enforcement of the sub-leases and wholly defeat plaintiff's cause of action. On the argument I was strongly impressed with the force of this objection. But subsequent reflection and examination has changed that impression.

A party may always waive or abandon a claim or right of action existing in his favor. This may be by express assent or by implication arising from acts which are wholly irreconciable with any attempt or proceeding to enforce the right. For example, if the plaintiff here should attempt to compel an assignment to him of the sub-leases, and succeeding in that, should attempt to enforce them as valid subsisting contracts as between him and the lesses, this would be such a clear and manifest ratification of the act of sub-letting as to estop plaintiff from insisting upon any forfeiture of the principal lease, because of the under-letting. But such is not the case in this action.

The plaintiff is proceeding in a legal manner to enforce his alleged right of forfeiture. He is constantly demanding the possession of these premises and treating the defendants as wrong doers for withholding them from him. If he succeeds he is entitled to recover and have the value of the fair rental of these premises during the time they are withheld from him. This rental is being paid to and received by one of the defendants (Nichols).

As between Nichols and the other defendants these "rents and profits" are monies due upon a contract, as between plaintiff and the defendants they are "mesne profits" which plaintiff (if successful) has a right by law to recover and have as the rental value of the premises while they are withheld from him; and when it is made to appear that these "rents and profits" are in danger of being lost or *impaired*, the Code expressly authorizes the court on "application" of the plaintiff, to take and hold by its receiver these "rents and profits" for the benefit of the party ultimately entitled.

The lease gives the party the right to avail himself of *both* these remedies in the same proceeding. The one being "*provisional*" and the other *final*.

It would therefore in my opinion be a perversion of justice, to hold that the act of pursuing *both* these remedies, was a defeat by *waiver* of the cause of action.

The order appealed from should be affirmed with costs.

BARBOUR, Ch. J., concurred.

SUPREME COURT.

JOSEPH BENNINGHOFF agt. THOMAS OSWELL.

Where a person is improperly arrested on an alleged criminal charge committed in Canada, and is *detained* under such arrest for the probable purpose of compelling him to settle a demand claimed to have been fraudulently made in Canada, and such purpose proving ineffectual, an order of arrest in a civil action is obtained and he is arrested under it:

Held a clear abuse of the *process of the law*, which cannot be sanctioned by the court. Order of arrest set aside with costs.

Chautauqua Special Term, 1868.

MOTION to discharge defendant from arrest.

H. A. SWARTZ and W. W. HOLT, *for defendant.*
C. D. MURRAY, *for plaintiff.*

DANIELS, J. As the offense of the defendant was committed in the province of Canada, and he was in no way amenable for it under the laws of this state, his arrest and detention upon the criminal process issued in the county of Chautauqua must have been made for some other purpose than his prosecution and punishment as a criminal. The probabilities are, that it was for the purpose of coercing him into a compromise or adjustment of the plaintiff's demand, for the money he alleged had been obtained from him by the defendant by means of the fraudulent representations made by him, at St. Catherines in Canada. After that was discovered to be ineffectual, the defendant appears to have been detained in custody under the same process, until an order for his arrest in a civil action could be obtained, and his arrest could be, and was, made under it.

This was a clear abuse of the process of the law, and the arrest made by means of it should not therefore be sanc-

tioned by the court under whose order it was accomplished. (*Wells* agt. *Gurney*, 8 *Bar. and Cress.*, 769; 15 *Eng. Com. Law*, 336; *Snelling* agt. *Watrous*, 2 *Paige*, 314; *Williams* agt. *Bacon*, 10 *Wend.*, 636; *Carpenter* agt. *Spooner*, 2 *Sand.*, 717; *Goupil* agt. *Simonson*, 3 *Abb.*, 474.)

The motion to set aside the arrest must therefore be granted with $10 costs.

N. Y. SUPERIOR COURT.

PAULINA AARON agt. MAYER BAUM and another.

The interposition of a court of equity to restrain *summary proceedings* has never been invoked except by a tenant or other *party to the proceedings*, and then only on the ground of fraud or surprise, or of some equitable title that could not be set up at law.

A stranger, that is, not a party to the proceedings, cannot obtain an injunction upon the allegation merely, that he is in danger of having his *possession disturbed*. (*This agrees with Marry agt. James, ante, p.* 52.)

Special Term, March, 1868.

THIS action was brought to obtain an injunction to restrain the prosecution of summary proceedings under the landlord and tenant act. Proceedings under such act were instituted before the city judge by the above defendants, claiming to be landlords of the premises known as No. 30 Oliver street, in this city, against one Levi Aaron. Pending such proceedings, the plaintiff commenced an action in this court against these defendants, praying for an injunction restraining the further prosecution of such proceedings and a temporary injunction was granted.

The action was tried without a jury. On the trial it appeared that the plaintiff and one Henzler were lessees of the premises under a former owner, and were in possession, claiming under such lease. When the defendants purchased the premises, they found the lease to the plaintiff and Henzler on record, and being informed that Levi Aaron was the lessee, they delivered to him a new lease. The summary proceedings were against him as the tenant, and the plaintiff was not a party.

S. HIRSCH, *for plaintiff.*
J. HENDERSON, *for defendants.*

MONELL, J. I am warranted by the evidence in this case in finding all the facts necessary to establish that the plaintiff is entitled to hold the possession of the premises in question under the lease from Rauth to Aaron and Henzler. I am satisfied that such lease has never, in fact or by operation of law, been canceled or surendered; and that therefore the plaintiffs holding under it, cannot lawfully be disturbed in or by any proceeding to recover the possession of the premises, instituted by the defendants against her husband, or in any proceeding to which she is not a party.

I have found that the lease from Rauth was to the plaintiff and Henzler, and that the plaintiff now holds under such lease. The weight of the evidence is, that she and Henzler were partners, and her husband, was merely her agent in and about her business of a weiss brewery; that he had no authority, express or implied, to cancel or surrender the lease; that it never was canceled or surrendered, but was in existence at the trial of this action, and that the plaintiff holds the possession of the premises under it.

The defendants, who purchased the reversion after the lease was recorded, took title subject to such lease; hence the lease to Levi Aaron, the plaintiff's husband, was inoperative to defeat the plaintiff's right to the possession. Nor is the plaintiff estopped from asserting her title by anything which occurred between Levi Aaron and the defendants. He had no express or implied authority to cancel the lease or surrender the possession of the premises, or to do any act or thing which would operate as an ,estoppel upon the plaintiff. It follows from these facts, that the plaintiff has a clear and undoubted right to the possession of the premises, and that any disturbance of such possession, either of herself or of her tenants, by or under the summary proceedings instituted against Levi Aaron, would be an unwarrantable trespass.

But with all this right on the plaintiff's side, I have not

been able to find any sufficient ground to authorize the continuance of the injunction.

The interposition of a court of equity to restrain summary proceedings has never, that I am aware of, been invoked except by a tenant or other party to the proceedings, and then only on the ground of fraud or surprise or of some equitable title that could not be set up at law (*Duigan* agt. *Hogan*, 1 *Bosw.*, 645). I do not know of a case, nor can I conceive of one, where a stranger, *i. e.* not a party to the proceedings, can obtain an injunction upon the allegation merely, that he is in danger of having his possession disturbed. His notice of the institution of the proceedings is not of any consequence. He has no right to appear, nor can he make any defense; but that of itself is not enough to warrant an injunction. I do not see, therefore, that the plaintiff occupies any different or worse position, than any person who is in danger of having a trespass committed upon his property or rights, and for such she has adequate remedies at law.

If upon the dissolution of the injunction a warrant should be issued, and upon its execution the plaintiff should be removed from her possession, the courts will afford her all the redress she may be entitled to, but the threatened injury is not of that irreparable nature that requires an injuntion to restrain its commission.

There must be judgment dissolving the injunction and dismissing the complaint, but without costs.

SUPREME COURT.

JOHN M. JAYCOX and others, appellants agt. WILLIAM CALDWELL and others, respondents.

A *post-nuptial* contract between *husband and wife*, by which property is set apart for her separate use, although void at law, will be sustained in equity, where there are no creditors of the husband to be affected.

Where, at the time of the marriage of husband and wife in 1841, the wife had money of her own, and in 1842, let her husband have $665, to use in his business:

Held, that as the law then was, the husband became legally entitled to the money in question as his own, and the possession which he acquired of it was with her assent.

But upon the facts found in this case, the husband, as far as he could, *waived his marital rights*, and received the fund named, not as his own, but as the *equitable trustee* of his wife, (which he could assume voluntarily,) and by that means obtained the possession of it, which for aught that appeared, he could not otherwise have done.

The agreement between the husband and wife, though not binding at law, was valid in equity, and sufficient as between them and all others, not then creditors of the husband.

Consequently, an *assignment for the benefit of creditors*, made by the husband in 1867, to pay creditors, which had become such in 1866, providing for the payment to the wife of the assignor the sum so received by him from his wife in 1842, was valid, and the claim a proper one to be paid out of the property of the husband.

Fifth District, General Term, October, 1868.

Before BACON, MORGAN, MULLIN *and* FOSTER, *Justices*.

APPEAL from a judgment in favor of defendants, entered on the report of a referee. The action was brought to set aside an assignment executed by William Caldwell, in which he preferred Corrilla Ann, who was his wife, to the amount of $700, the plaintiff claiming that she had no such valid demand against him; that it was void as against his creditors, and that they were creditors of his.

The referee found the plaintiffs on, or about, the 13th of April, 1867, recovered a judgment in this court against William Caldwell, of upwards of $250, which was duly docketed and a transcript thereof filed in the clerk's office of Ontario

county, on the 15th of that month. That an execution thereon, was duly issued to the sheriff of Ontario county, where William Caldwell then resided, and still resides, and that it was returned wholly unsatisfied, and so yet remains; and that the plaintiff's were still the owners thereof.

That on the 4th of March, 1867, John Crouse and others recovered a judgment in this court, against William Caldwell, for more than $100 which was also duly docketed and a transcript filed in the clerk's office of Ontario county. That an execution was duly issued to said sheriff, and returned wholly unsaisfied; that before the commencement of this action the plaintiffs in that judgment assigned it to these plaintiffs' who still were the owners thereof, and that it remained wholly unpaid; that William Caldwell and Corrilla Caldwell are husband and wife and were married in the year 1841.

That on, or about, the 4th day of February, 1867, William Caldwell being then insolvent, made an assignment of all his property to Horace Miller and Wilkinson Thompson in trust for the benefit of his creditors, that said trustees failing to file the necessary security, were by an order of the supreme court, dated on, or about, February 23, 1867, removed from their said offices of trustees under the assignment, and the defendant, Marvin A. Payne, was appointed to execute the trust in their stead as assignee or receiver.

That the defendant Corrilla A. Caldwell, was named and preferred in the assignment as a creditor of William Caldwell to the amount of $700 which indebtedness was stated in the assignment to have been incurred by William Caldwell to Corrilla Ann Caldwell for monies loaned and advanced by her to him within the three years next preceding the date of this assignment.

That at the time of making the assignment, William Caldwell was actually and justly indebted to Corrilla A. Caldwell in the sum of $700 for monies borrowed by him of her

within the three years next preceding the date of the assignment.

That the defendants William and Corrilla, cohabited together since the time of their marriage; and that at the time of such marriage, Corrilla had $1,100 in monies, which belonged to her, and between that time and up to the year 1847, he had of her from that money in 1841, $65. In 1842, $600. In 1844, $100 and in 1846, $50, making in all $815; that he returned to her during the same time, in 1844, $100. In 1846, $50. And at another time $35, making in all $185.

That from the year 1846, up to the time of the assignment, he received from her said moneys; in 1848, $25; 1853, $75; 1855 or '56, $50; 1864, $100; 1866, $175; 1866, $50; and 1867, $50; amounting to $525. And returned to her during that time in 1848, $25; between 1850 and 1860, $250; and between 1860 and the assignment, $250; making the sum $525. That during the year 1841, William Caldwell after the marriage bought a horse in his own name with the $65 got that year of Corrilla, which subsequently died while he owned it.

That in 1842, he purchased and took title in his own name to a mill property and house and lot, and paid therefor, the $600 got by him of his wife; that they occupied the premises so purchased for about two years, when he failed in business, and the property was sold on judgment and execution against him and taken to pay his debts; that the wife knew of such sale, but took no steps to recover the $600 paid therefor; that the wife did not take title in her own name to any property purchased with the avails of the $1,100 which she had at the time of the marriage, until after her husband's failure in 1844 or '45; that after that time real estate was purchased in her name with the avails of said moneys, and transferred from time to time until about fifteen years ago, when the property where they now reside, in Clifton Springs, (being a house and lot,) was purchased

in her own name, with the avails of said moneys and which now is owned by her, and is of the value of over $1,500; that they have no children living; that in 1863, William commenced trading as a merchant at Clifton Springs, with Messrs. Jaycox & Green and Crouse & Co., and so continued to deal with them until January, 1866, but at that time had paid them up; that in January, 1866, Messrs. Hannah & Harmon bought in with said William a two-third interest and the business continued in the firm name until the fall of 1866, when William repurchased the interest in the business sold to Hannah & Harmon, and continued the same down to the time of the assignment; that in December, 1866, the purchases were made by William of Jaycox & Green and of Crouse & Co., upon which their judgments aforesaid were recorded against him; that after Hannah & Harmon had gone in with him in said business, they dealt with Jaycox & Green and with Crouse & Co., buying goods from time to time of them, and that when Hannah & Harmon sold to William in the fall of 1866, William and Hannah & Harmon were indebted to both Jaycox & Green and Crouse & Co. for goods sold them by Jaycox & Green and by Crouse & Co.; that after the retransfer of the business by Hannah & Harmon to William, he paid such indebtedness and contracted the indebtedness upon which the judgments were subsequently obtained against him by Jaycox & Green and by Crouse & Co.; that on the transfer by William to Hannah & Harmon, they gave him their note for $600 at two to three months, and which he delivered to his wife, and after it became due, got it again of her and received the moneys due thereon, promising to repay her the same; that at the time of the delivery of the note to her, he was insolvent and unable to pay his debts, and was, in connection with Hannah & Harmon, trading with Jaycox & Green and with Crouse & Co., and that the items of $65 received by the husband in 1841, and of $600 received by him in 1842, of the said wife, formed part of the claim for

which the wife was preferred in the assignment for $700, and that, excluding those items, there was no consideration between husband and wife either for the transfer to her of the Hannah & Harmon note or for the amount of $700 for which she was preferred in the assignment; that out of the avails of the $1,100 which she had at the time of the marriage, there was settled upon her by way of real estate, owned by her at Clifton Springs, over $1,500; that the intention of William Caldwell, in preferring Corrilla in the assignment for the sum of $700, was that she might be paid that sum for the money she let him have which belonged to her at the time of their marriage, or which was the avails thereof.

That the said assignment was made and preference given to Corrilla A. Caldwell in good faith and without the intent to hinder, delay or defraud the creditors of William Caldwell. And he found, as a conclusion of law, that the defendants were entitled to judgment for the dismissal of the complaint with costs, upon which judgment was entered and the plaintiffs appealed.

HUNT & GREEN, *for appellants.*
JOHN SNOW, *for respondents.*

FOSTER, J. The facts found in reference to the transactions between William Caldwell and his wife are proved mainly by the testimony of himself, though he is to some extent corroborated by the testimony of one Thompson, who was a brother of Corrilla Caldwell.

These transactions are subject to very great suspicions when taken in connection with all the circumstances of the case. But there is no contradiction of his testimony, and we cannot say that the referee had no right to give credit to it.

We are to assume, therefore, that all the facts found by the referee were established; and it presents the question

whether upon such a transaction, if it was all fair and honest, between the husband and wife, and in all respects as it is now claimed to be, the wife had such a claim upon her husband for the sums of $65 and $600, which he received from her, that he could legally provide for the payment of it out of his property, to the exclusion of any of his other creditors.

The fund from which those sums were taken was money which she had at their marriage, and there is no doubt that, as the law then was, (it being in her possession), he was legally entitled to it as his own.

If it was so situated that he could reach it by a suit at law, he could do so in despite of her, and a court of equity would not interfere to prevent it. But if it was necessary for him, in order to get it, to apply to a court of equity, it might direct a suitable provision to be made out of it for her, (*Udell* agt. *Kearney*, 3 *Cowen*, 590). If she permitted him to take the possession of it unconditionally, it became his absolutely, (*Shirley* agt. *Shirley*, 9 *Paige*, 363). So, too, if she had died before he reduced it to his possession as his own, he could have the right to do so afterwards. (*Westervelt* agt. *Gregg*, 2 *Kernan*, 202; *Blanchard* agt. *Blood*, 2 *Barb. S. C. R.*, 352; *Ransom* agt. *Nichols*, 22 *Y. Y.*, 110.

He might also, before he had actually reduced the money to his possession, have assigned it and it would have passed the title to it, but in that case it would have been subject to her equitable right to have a suitable provision for her out of it. (*Carteret* agt. *Paschel*, 3 *Piere Wms.*, 197; *Bates* agt. *Daudy*, 2 *Atk.*, 206, *and Westervelt* agt. *Gregg*, *supra.*)

The husband is not only entitled to all the personal property and choses in action of his wife, except when it is otherwise declared by the recent statutes, and entitled to reduce them to his possession after her death, and entitled to the proceeds of her labor while covert, but she has no right to dispose of it by will, although he permitted her to receive, manage and invest it in her own name as if it were her own

property; and evidence of such a course of dealing by the wife with personal property bequeathed to, or earned by her, and her husband's declarations that she should give her money to whom she pleased, only established an omission to exercise his marital rights in her life time, and do not imply a relinquishment of his rights in case of survivorship. (*Ryder* agt. *Hulse*, 24 *N. Y.*, 372; *Same Case in supreme court*, 33 *Barb.*, 264.)

It is equally true that husband and wife, especially before 1848, could make no valid contract directly between themselves which would be binding at law; and this principle is too familiar to need the citation of authorities.

It, therefore, cannot be disputed that by the marriage between William Caldwell and Corilla, he became legally entitled to the money in question as his own, and the possession which he acquired of it was with her assent.

Now, the questions are presented whether, if her assent to his possession of it was unconditional, it left any interest of it in her which a court of equity would protect.

And however that may be, although he could make no valid legal contract with her, could he contract or waive the marital rights which he acquired, so as to leave her an equitable right to the fund against the plaintiffs and Crouse & Co., who were not his creditors at the time of those transactions?

The jurisdiction of courts of equity to make provision for the wife out of her estate to which the husband was legally entitled, was first assumed in cases where it was necessary for him, or those claiming under him, to apply to the court for assistance to obtain possession of the property of the wife, which assistance the court, acting upon the maxim that he who asks equity must do equity, withheld until an adequate settlement was made. (*Willard's Eq. Jur.*, 636; 1 *Peire Wms.*, 450.)

But ever since the commencement of the present century this restriction upon the jurisdiction has been exploded, and

the wife has been permitted actively to assert her equity as plaintiff. (*Id*, 636, *and 5 Vesey*, 737; *5 Mylne and Craig*, 105; 11 *Sims*, 569; 4 *Hale*, 6.)

So that, as between them, her equitable interest in it, to some extent (to be found by the court), would remain though his possession of it was unconditional. But Corilla being in the actual possession of the fund, had a right as against him to retain it, or at least so much of it as the court should decide was equitable for a provision for herself, or rather to have such provision made for her out of it. And as he could not sue her at law, there was no way for him to obtain possession of it without doing equity, by making a suitable provision for her.

Upon the facts found in this case, he, as far as he could, waived his martial rights to the fund, suffered a portion of it to be retained by her to use as she would, and received the two sums of $65 and $600 not as his own, but as her equitable trustee, and by that means obtained the possession of it which, for aught that appears, he could not otherwise have done.

I think he could take it as her trustee; that he could assume the relation voluntarily so as to give her the right to treat him as such as between themselves, to the same extent as if he had been made so by an order of the court.

A post nuptial contract between husband and wife by which property is set apart for her separate use, although void at law, will be sustained in equity, where there are no creditors of the husband to be affected. (*Galick* agt. *Strong*, 3 *Paige*, 440, 452.)

"If he takes possession in the character of trustee and not of husband, it is not such a possession as will bar the right of the wife to the property if she survives him. The property must come under the actual control and possession of the husband, or the wife will take as survivor, instead of the personal representatives of the husband." (2 *Kent's Com., 5th edition*, 138.)

I think the agreements between Caldwell and his wife, though not binding at law, were, according to the principles laid down in the cases, valid in equity, and sufficient as between them and all others not then his creditors. (*Partridge* agt. *Harens*. 10 *Paige* 618. *Wicks* agt. *Clark*, 8 *Paige* 161. *Schaffner* agt. *Rutter*, 37 *Barb.*, 44.)

Again, there seems to be no doubt that the wife, although she has a valid equity as between herself and husband in her personal estate may waive it, notwithstanding her coverture, and when waived by her, her equity is gone and her interest in it and that of her children is defeated. (*Willard's Eq. Jurisprudence*, 637.)

Now, if the wife can waive her martial rights in her personal estate, I see no reason why the husband (he having, while it remains with her, only an equity,) cannot waive his, and come into the possession of it, or a portion of it, as hers; and I see no reason why his afterwards having creditors should make any difference. The precise question has been decided in *Woodworth* agt. *Sweet* (44 *Barb.*, 268), where it is held that he may waive his martial rights to her personal estate, and that his agreement with her not to assert such rights equitably entitled her to receive from him payment of such portion of the fund as she had lent him. And as it is clear that if the husband does not in his lifetime reduce such property of the wife to his possession, it amounts to a waiver as against all except his creditors, and it belongs to her after his decease.

It would seem equally clear that he can at once make such waiver at any time, by an act done by him, provided there are then no creditors to be injured by it.

Although the case on the part of the husband and wife is quite suspicious, yet we must follow the findings of fact reported by the referee, and therefore the judgment should be affirmed.

Judgment affirmed.

This case is now pending in the court of appeals.

N. Y. SUPERIOR COURT.

ISAAC SIMON, appellant agt. ALEXANDER S. KALISKE. respondent.

The act of April, 1860, providing for a *general assignment for the benefit of creditors*, requires a *record* of the assignment, in these words, to wit:

"§ 6. Every conveyance or assignment made by any debtor or debtors under the provisions of this act, *shall be recorded in the clerk's office of the county* in which such debtor or debtors resided at the date thereof; and every inventory of the property of such debtor or debtors made under the provisions of this act, shall be filed in the same office where such assignment is recorded."

Held, that this statute did not convey *constructive notice*, to any purchaser of *real estate in the city of New York*, which had been previously conveyed by such a general assignment and recorded in the county clerk's office of the city and county of New York; and where the purchaser had not received actual notice of such recorded, assignment or information thereof sufficient to put him on inquiry, he must be considered a *bona fide* purchaser without notice, and capable of conveying and executing a good title to such real estate, free from the incumbrance or conveyance caused by such assignment.*

General Term, April, 1869.

Before Ch. Justice BARBOUR, *and Justices* JONES *and* FITHIAN.

ON the 6th of November, 1867, defendant contracted, under seal, for the consideration of $13,000, receipt of which was acknowledged, to sell and convey to plaintiff the house and lot No. 264 (old No. 168) West 40th street, for the price of $13,000 payable as follows: $500 on signing the contract; $6,000 on the 2d of January, 1868; and the residue by assuming a mortgage for $4,000 on the premises, and by a further mortgage for $2,500. The deed was to be delivered on or before the 2d of January, 1868, and was to convey

*If every person is supposed to know the law, this statute requiring the assignment to be recorded in the county clerk's office, being unrepealed would seem to be constructive notice of the record of the assignment.

the fee simple of the premises, free from all incumbrances, except as above stated.

Besides the $500, plaintiff also paid defendant the further sum of $3,000 on the 2d of January, 1868.

On his examination of the titles, plaintiff's conveyancer ascertained that in 1860 the title was in Daniel D. Lord, who conveyed to Henry J. Surtees. Surtees executed two purchase money mortgages for $5,500 to James Cooper Lord, and subsequently, in 1860, conveyed the premises to David Vreeland, subject to these mortgages, which Vreeland assumed.

Vreeland, by an instrument dated January 7, 1861, and recorded in the office of the county clerk of the city and county of New York, in Liber 4 of General Assignments, page 27, January 7, 1861, made a general assignment, for the benefit of creditors, to Henry J. Irving, and conveyed these premises.

Plaintiff's counsel was apprised of this general assignment by the return to his county clerk's search. Nearly eighteen months after this assignment, Mr. Lord commenced an action for the foreclosure of his mortgages. The assignee, Henry J. Irving, was not made a party to the foreclosure, and has never sold or conveyed said premises. This omission brings up one question on this appeal. It was regarded by the purchaser as an objection to the title, which the seller, by his contract was bound to obviate. but which he failed to do.

The seller still retains his property, and plaintiff's $3,500.

The plaintiff sought a specific performance of the contract or the return of his money.

The cause was tried in April, and decided in December last. No opinion was delivered, but the complaint was dismissed with costs.

This appeal is from the judgment on that decision.

The judgment below was based on the conclusion of law, that the record of the general assignment in the county

clerk's office was not constructive notice thereof, so that the assignee was not a proper party to the foreclosure.

GEORGE H. FORSTER, *attorney, and*
JOHN A. WEEKS, *counsel for plaintiff, appellant.*

I. The laws of this state have provided several record offices for the different descriptions of conveyances and incumbrances, affecting the titles to real estate. In this city, the register office for deeds and mortgages, loan commissioners' office for their mortgages, county clerk's office for judgments, mechanics' and unsafe building liens, *lis pendens*, sheriff's and marshal's certificates, insolvent assignments, foreclosures by advertisement, and appointment of receivers, U. S. circuit court clerk's office for judgments of that court, U. S. district court clerk's office for judgments of that court, adjudications of bankruptcy and appointment of assignees, tax, arrears, assessments, and Croton aqueduct department for unpaid taxes, assessments and Croton water rates, and sales for the same.

From the searches of Mr. Day, the plaintiff's attorney, in preparation for the foreclosure, it appears that he did not include general assignments in his requisition, while the requisition for general assignments contained in the search of Mr. Weeks brought out the return of this Vreeland assignment. The record of this assignment in Liber 4 of general assignments, January 7th, 1861, under the law passed April 13th, 1860, shows the number of these assignments in that short period so recorded, pursuant to § 6 of ch. 348, laws 1860, page 596.

II. The court at special term, concluded that Henry J. Irving, though not a party, was fully barred by the decree in the foreclosure. The notice of *lis pendens* was filed the 25th of June, 1862.

By § 132 of the Code "Every person whose conveyance or incumbrance is subsequently executed, or subsequently

recorded, shall be bound by all proceedings taken after the filing of such notice."

But this general assignment was executed and recorded nearly 18 months prior. Section 132 of the Code does not limit the place of record to the register's office. This assignment was not recorded there. The register's office is the place for the record of deeds and mortgages; other conveyances and incumbrances affecting real estate are to be recorded elsewhere. For places of record as to judgments, c. f. §§ 63 and 282 of the Code; mechanics' liens, § 2, p. 339, ch. 220, laws of 1844; § 6, ch. 513, p. 955, laws of 1851; § 3, p. 760, laws of 1855; § 6, p. 862, laws of 1863; § 1, p. 1634, laws of 1866; c. f. also § 39, p. 593, laws of 1862.

Sheriff's certificates, § 1, act of April 12, 1820, vol. V, p. 167; § 57, (*sec.* 43,) title V, ch. VI, 2d part Revised Statutes, 2 R. S., 370; § 1, p. 93, laws of 1857.

Surrogate's order for sale of land to pay debts is of record with the Surrogate. Foreclosures by advertisement with the county clerk, §§ 11 and 12, 2 R. S., 547. Orders for sale of infants' and lunatics' estate by special guardians and committees in county clerk's office, also orders for appointment of receivers of judgment debtors; § 298 of the Code, § 15, p. 850, laws of 1862; ch. 392, p. 661, laws 1863. (*Porter* agt. *Williams*, 9 *N. Y.*, 142; *Judgments of U. S. courts*, *Brightly's Digest*, 449; 5 *U. S. Stat. at Large*, 393; *Wood* agt. *Chapin*, 13 *N. Y.*, 509; 7 *How. P. R.*, 381; 5 *U. S. Statutes at Large*, 442, 443, 448; § 14, *act of March 2d*, 1867; *Price* agt. *Philips*, 3 *Rob.*, 448.)

III. By § 33 (*sec.* 28,) of article 3, § 9 of article 5, title 1, chapter 5, of the 2d part of the Revised Statutes, the effect of the insolvent assignments there provided for by law, is declared to be to vest in the assignees all the interest of the insolvent at the time of executing the same in any estate or property, real or personal, whether such interest be legal or equitable (2 *R. S.*, 21 *and* 30). Every assignment executed under the third, fourth, fifth and sixth articles of that

title, shall be recorded by the clerk of the county in which it was executed, upon being acknowledged or proved, in the same manner as deeds of real estate. (§ 20 *of article seventh of same title*; 2 *R. S.*, 38, *p.* 112 *of* 3*d vol. of* 5*th edition.*)

So that before the law of 1860, the statutory insolvent assignments were recorded, in New York, in the county clerk's office.

In like manner, and in conformity with this practice, the place of record for general assignments under act of 1860 was fixed by the sixth section of that act as the county clerk's office. (§ 6, *ch.* 348, *act of April* 13, 1860, *p.* 596, *laws of* 1860.)

IV. That is the only place by law designated for the record of such assignments. By such record of this assignment in that office, on the 7th of January, 1861, Henry J. Irving, within the meaning of § 132, was a person whose conveyance or incumbrance was executed and recorded prior to the filing of the *lis pendens*, in *Lord* agt. *Vreeland*, and was, therefore, wholly unaffected by the judgment in the foreclosure.

The decision at special term would require a double record of every general assignment in this city, in order to give them validity as to real estate, while the statute requires but one.

This court has heretofore sustained the provisions of this law and sustained assignments under it, passing real estate. (*Morrison* agt. *Atwell*, 9 *Bosw.*, 503; *Read* agt. *Worthington*, 9 *Bosw.*, 617.) The intention of this statute as to these assignments was "to protect those interested under them" (*p.* 629).

Scott agt. *Guthrie*, (10 *Bosw.*, 408,) where it is expressly stated that the assignment was recorded with the clerk of the city and county of New York (*p.* 410) fifth line from bottom of page: "The section of the act which requires that assignments shall be recorded in the clerk's office of the county where the assignors resided at the delivery of the as-

signment must receive a liberal construction." "The purposes of the statute" (in case of non-residence, the case then) "are answered by recording the assignment in the county where the assigned property is" (*p.* 416). (*Powers* agt. *Gradon*, 10 *Bosw.*, 630; *Iselin* agt. *Dalrymple*, 2 *Robt.*, 142; *Loeschigh* agt. *Jacobson*, 2 *Robt.*, 645.)

The supreme court has likewise sustained such assignments and construed the provisions and intentions of said act in like manner. (*Baldwin* agt. *Tynes*, 19 *Abb.*, 32; *Hoton* agt. *Neidig*, 17 *Abb.*, 332; *Juliand* agt. *Rathbone*, 39 *Barb.*, 97; *Turner* agt. *Jaycox*, 40 *Barb.*, 164.)

V. The assignee, Henry J. Irving, inasmuch as he was entitled, under the general assignment which was recorded January 7, 1861, eighteen months prior to the filing of the notice of *lis pendens*, is within the protection of the principles of *Price* agt. *Philips*, in this court, and unaffected by the foreclosure proceedings. (3 *Robertson*, 448; *Walsh* agt. *Rutgers Fire Ins Co.*, 13 *Abb. P. R.*, 33; *Slee* agt. *Manhattan Co.*, 1 *Paige*, 48; *Vandcrkemp* agt. *Shelton*, 11 *Paige*, 28; *The Eagle Fire Ins. Co.*, agt. *Lent*, 6 *Paige*, 635.)

VI. The court erred in its decision at special term, in that it merely dismissed the complaint and did not finally decide all the rights of the parties on the questions presented by complaint and proof. The whole case was before the court; and the plaintiff was entitled to have a decision of all the matters in controversy. (*Bidwell & Banta* agt. *Astor Mutual Ins. Co.*, 16 *N. Y.*, 263.)

"The rule of courts of equity was when, they had acquired jurisdiction, and had the whole merits before them, to proceed and to complete justice between the parties," and the Code makes that rule applicable to all actions. (*Philips* agt. *Gorham*, 17 *N. Y.*, 270; *N. Y. Ice Co.* agt. *N. W. Ins. Co.*, 23 *N. Y. R.*, 357; *See* agt. *Partridge*, 2 *Duer*, 463; *Marquat* agt. *Marquat*, 11 *N. Y.*, 2 *Kern.*, 336; *Fowle* agt. *Jones*, 1 *Robt.*, 87.)

By the tender of the deed, which is alleged in the pleadings and found by the decision, under the established rule in this state, the plaintiff became the debtor of the defendant for the balance of the purchase money, and was entitled to the conveyance of the property on payment thereof, and of such damages, by way of interest or otherwise as the defendant may be entitled to for the plaintiff's delay. (*Richards* agt. *Edick*, 17 *Barb.*, 260 *and cases cited* 265.)

This was not one of those cases where time is of the essence of the contract. The court should have adjudged a specific performance of this contract, on the payment of the balance of purchase money, and have held plaintiff liable for such damages, by way of interest, as defendant might have suffered by plaintiff's delay, which certainly was not unreasonable. Or if defendant preferred to retain his property, he should be adjudged to return plaintiff's money.

The judgment of dismissal was erroneous, and should be reversed, and a proper judgment rendered, which should dispose of all the questions arising on the facts between these parties.

JOSEPH C. LEVI, *attorney, and*
JOSHUA M. VAN COTT, *counsel for defendant, respondent.*

I. The general registration acts, require all conveyances of interests in land, in the city and county of New York, to be recorded in the office of the register of deeds, to charge *bona fide* purchasers with constructive notice thereof. (1 *R. S.*, 755, *sec.* 1.)

Voluntary assignments for the benefit of creditors are not excepted from the operation of the general act, by the assignment act of 1860. (*Laws* 1860, *ch.* 348, *p.* 594, *sec.* 6.)

"Every conveyance or assignment made by any debtor or debtors under the provisions of this act, shall be recorded *in the clerk's office of the county in which such debtor or*

debtors resided at the date thereof; and every inventory of the property of such debtor or debtors, made under the provisions of this act, shall be *filed* in the same office where such judgment is recorded."

The general purpose of this act was to remedy certain notorious evils and secure to creditors notice and knowledge (1) of the *fact* of such assignment (§ 6) and (2) notice of its provisions, and of the property which passed to the assignee; (3) a remedy (§ 5) against the assignee, enforcing a due administration of the assigned estate. Of course, the record is notice to the *creditors* and to all persons interested in the *assignment.* The act does not in terms, or by reasonable implication, affect persons who are not creditors or interested in the assignment.

It will be observed, that the assignment may be of *all the assignor's property*, without specifying whether it is real or personal, or designating the property in any way. The debtor "within twenty days" after making the assignment, is required (§ 2) to deliver a schedule or inventory of his property to the county judge; and § 6 provides, that "every *inventory* of the property of such debtor or debtors made under the provisions of this act, shall be *filed* in the same office where *such assignment is recorded.*" So that there is no *record*, but simply a *filing* of the description of the real estate which passes under the assignment.

All the provisions of this act are enjoined, although only *personal* estate passes under the assignment.

II. The act of 1860 has no feature common to general registration acts.

1. Those acts require the conveyance, which *describes* the property, to be *recorded*; this act merely requires a general inventory of the property, real and personal, to be *filed.*

2. Those acts require the conveyance to be recorded *before* it becomes effective, as notice to *bona fide* purchasers; this act permits the designation of the property to be *filed*,

for all the effective purposes of the act, twenty days *after* the making of the assignment.

3. Those acts require the conveyance to be recorded in the *registration district* where the property is situated; this act requires the filing of the inventory, not where the property is located, but in any county, however remote, where the assignor may happen to reside.

The effect of this construction would be, to require every person dealing with real property after 1860, to know, first, where every person who had had an interest in it *had at any time* thereafter resided; second, whether any such person had been insolvent; third, when he had been insolvent; fourth, whether he had ever made an assignment, and where he resided when he made it. Upon this construction and theory, our title would be defective, if Irving (*the assignee*) had been a party to the foreclosure, if the assignor had happened to make an assignment in some other county where he lived at a prior date.

Consequences so extraordinary, and so inimical to the convenience and safety of transactions in real estate, could not have been intended by the legislature.

III. There are various special liens, where statutes prescribe the mode of the notice and its effect in creating a lien, viz:

1. Taxes and assessments. (1 *R. S. Banks, 5th ed., pp.* 917 *to* 954.)

2. Bonds of receivers of taxes and their sureties. (*Laws of* 1843, *chap.* 230.)

3.—4. Judgments in U. S. circuit and district courts. Vide—acts organizing them.

5. Mortgages to U. S. loan commissioners. (*Laws of* 1837, *chap.* 150, § 43; *New York Life Ins. Co.* agt. *White,* 17 *N. Y. R.,* 469.)

6. Conveyances, mortgages, leases, &c. (3 *R. S., Banks 5th Ed., page* 45, § 1.)

7. Judgments of state courts. (2 *Edmond's Stat., p.* 371, § 3, *and Code* § 282.)

8. Notices of *lis pendens.* (*Code* § 132.)

9. Mechanic's Liens. (*Laws,* 1844, *chap.* 305; 1854, *chap.* 402; 1858, *chap.* 204.)

10. Certificates of Sheriff's sale. (2 *Edmd.'s Stats., p.* 388, §§ 61 *and* 62.)

11. Collectors' bonds. (1 *Edmd.'s Stats., p. p.* 318 *and* 319, §§ 19 *and* 20; *Laws of* 1838, *chap.* 216.)

12. Foreclosures by advertisement. (3 *R. S., Banks' 5th ed. p.* 859, § 3, *subd.* 2; *and p.* 861 §§ 8 *and* 12, *and p.* 860, § 6.)

13. Appointment of Receivers. (*Code* § 298.)

The decisions in other states, on similar statutes, accord with the decision here appealed from. (*Burrill on Assignments, 2nd ed.* 292–3.)

IV. There was no actual notice of the assignment.

To make a notice effective, it must reach all the parties through whom the title is derived. A grantor without notice can convey a good title to a grantee with notice; and a grantor having notice can convey a good title to a grantee without notice. (*Wood* agt. *Chapin,* 3 *Kern.,* 509; 1 *Story's Eq.,* § 409; *Jackson* agt. *Given,* 8 *J. R.,* 401; *Demarest* agt. *Wynkoop,* 3 *J. Ch. R.,* 147; *Fort* agt. *Burch,* 5 *Barb. R.,* 194; *Hooker* agt. *Pierce,* 2 *Hill* 654; *Jackson* agt. *Post,* 15 *Wend.,* 595; *Varick* agt. *Briggs,* 5 *Paige,* 329; *Jackson* agt. *McChesney,* 7 *Cowen,* 360.)

V. Any record made or notice given after *lis pendens* filed would have been ineffective. (*Code as amended in* 1858, § 132; *Stern* agt. *O' Connell,* 35 *N. Y. R.,* 104; 1 *Story's Eq.,* §§ 405, 406; *Cleveland* agt. *Boerum,* 24 *N. Y. R.,* 613.)

The judgment should be affirmed with costs.

By the court, BARBOUR, Chief J. This was an action brought by the vendor on a contract which was made in

1867, for the sale and purchase of a lot of land in this city, against the vendee therein, to obtain a specific performance, or the return of a portion of the purchase money paid thereupon.

By the contract in question the defendant undertook to execute to the plaintiff "a proper deed for the conveying and assuring to him the fee simple of the premises free from all incumbrances," except certain mortgages therein mentioned, and the plaintiff agreed to pay therefor $6,500, in money, and to assume the payment of these mortgages, and the sum of $3,500 was then and subsequently paid by him upon the contract. But, before the delivery of the deed, the plaintiff discovered upon an examination of the title, that in 1860, David Vreeland, the then owner of the premises, mortgaged the same to J. C. Lord, for $5,500; that in 1861, Vreeland conveyed and assigned the land, with other property, to Henry J. Irving, for the benefit of the assignor's creditors, which deed of assignment and conveyance was filed in the county clerk's office as an assignment; that in 1862, a foreclosure suit was brought upon the Lord mortgages, resulting in a judgment under which the premises were sold by the sheriff to John Douglas, who subsequently conveyed them to one Fitzpatrick, by whom they were granted to the defendant, but that Irving, the assignee of Vreeland, was not made a party to such foreclosure suit.

On ascertaining those facts (which I may here say were fully proven upon the trial, as well as the further fact, that some of the creditors mentioned in the assignment were still unpaid) the plaintiff objected to the title, upon the ground, that the estate and interest of Irving in the premises, were unaffected by the decree of foreclosure, and requested the defendant to procure a release of that interest, and subsequently also requested him to return the $3,500.

The defendant refused to comply with either of those requests, but made and tendered to the plaintiff a deed of the premises, which deed the plaintiff rejected.

No evidence was given upon the trial tending to prove that Vreeland's deed of assignment to Irving, had ever been recorded in the office of the register of deeds, nor that the defendant, or either of the persons under whom he derived title, subsequent to the sheriff's sale, had any actual notice or knowledge of the existence of such assignment, and for that reason, the learned justice, before whom the trial was had, directed a judgment dismissing the complaint with costs.

The ultimate question to be determined by the court on this appeal, is whether the deed which was made and tendered by the defendant to the plaintiff, would, if accepted by the latter, have vested in him an estate of inheritance in the premises in fee simple, free from incumbrance. For if it would, such tender and refusal exonerated the defendant from all obligation, either to convey the land or to return that portion of the purchase money which he had received upon the contract, and the judgment dismissing the complaint upon the merits, was consequently just and proper.

The assignment to Irving was not a mere incumbrance upon the title, but was a full and complete deed of conveyance of the premises in fee, for the purposes of the trust. A purchaser therefore, deriving his title from Vreeland subsequent to his grant to Irving, must be presumed to have purchased in good faith, and in ignorance of that deed, unless it appears that he had notice thereof, at the time of the conveyance to himself. The notice required may be either actual or constructive, the latter being the mere creature of the statute, as provided for in a single section (1 *R. S.*, 756, §1), and the other, embracing at least such knowledge or information, in the actual possession of the purchaser at the time of the conveyance to himself in regard to the prior grant, as would put a careful, prudent man upon further inquiry.

The fact that the deed of assignment was recorded in the county clerk's office, was wholly unimportant.

The statute provides for but one kind of constructive notice viz: the recording of the deed in the register's office; and therefore, the purchaser finding there, upon examination, no record of a prior grant, would have a right to suppose none existed, unless he had been informed in some way, that such grant had been made. In the absence of such information, he was no more bound for his own safety, to search the records in the county clerk's office for a deed of conveyance, than he was to examine the records of this court for that purpose; although if he has been informed that a conveyance of the land was embraced in an assignment made by Vreeland to Irving for the benefit of creditors, it probably would have been his duty to examine the records in the clerk's office, to see if that assignment contained a conveyance of the land.

It was incumbent upon the plaintiff to prove, upon the trial, that the assignment to Irving was recorded as a deed, in the register's office, prior to the recording there of the sheriff's deed, or to show by competent evidence, that the grantee in that deed, and also, his grantee and the defendant, were informed prior to the recording of their deeds, respectively, that the land had previously been conveyed by Vreeland. For, if either of those persons took and recorded the conveyance to himself in good faith, and in ignorance of the prior grant, his title was not only good, but he could confer a like perfect title upon one who had a full knowledge of such prior conveyance. "If this were otherwise," as Chancellor WALWORTH says, in *Varick* agt. *Briggs*, (6 *Paige*, 323) "a *bona fide* purchaser might be deprived of the power of selling his property for its full value."

As neither of those facts were proven, the complaint was properly dismissed.

The judgment must be affirmed with costs.

I concur, S. JONES, F. J. FITHIAN, JJ.

UNITED STATES DISTRICT COURT.

SAMUEL SCHUYLER agt. THE STEAMER CORSICA, &c.

Where two *steam vessels* are crossing each others courses—one having the other on her starboard side, being in plain sight of each other, in an open river at midday, in clear weather and no other vessels moving near them to affect in any way their action, it is the duty of the vessel standing on the starboard side to *keep on her course*, and the duty of the other to avoid her.

Southern District, 1869.

THIS was an action brought to recover $11,000, being the damages arising out of a collision which happened in this port on the 9th of November, 1865, between the steamer America and the steamer Corsica.

The Corsica was at the time proceeding down the North river, bound to sea. The America was below her and proceeding across the river from the battery to her pier at the foot of Sussex street, Jersey City. The America was struck on the starboard side, some forty feet from the stern, the Corsica sweeping aft without injuring the hull of the America, but staving off her starboard guard from the gangway aft to the wheel, staving the wheel and bringing up with great force upon the shaft, which was split in the inboard journal, and shoved off against the after wheel-beam.

MR. VAN SANTVOORD, *for libelant.*
MR. LORD, *for claimant.*

BENEDICT, J. This case has been argued with earnestness on both sides, and the voluminous evidence presented before me has received my careful attention. The argument on the part of the Corsica is ingenious, but it has failed to convince me of the correctness of the management of that vessel up-

on the occasion in question, and I must hold the libelant entitled to recover.

The two vessels were crossing each others courses, the America having the Corsica upon her starboard side. They were in plain sight of each other in an open river at midday, in clear whether, and no other vessels were moving near them to affect in any way their action. It is therefore, no special case, but one manifestly within the provisions of art. 14 and 18 of the rules of 1864. Under these rules it was the duty of the Corsica to keep on her course, and the duty of the America to avoid her.

The America, accordingly, stopped before she reached the course of the Corsica, and backed, and I am satisfied would have avoided her, had not the latter vessel disregarded the rule, and instead of keeping on her course down the river, undertaken to avoid the America by sheering to the east. This action on the part of the Corsica, which I do not find justified by any circumstances proved in the case, was the cause of the collision which ensued, and renders her responsible for the damage caused thereby.

As to the defense that the Corsica was under the direction of a licensed pilot, and therefore not responsible for a collision caused by his improper order, it is sufficient to say that this defense has been overruled by the circuit court of this circuit in the case of the China.

The decree must accordingly be for the libelant, with an order of reference to ascertain the amount of the loss.

N. Y. SUPERIOR COURT.

RUFUS W. LEAVITT and another agt. CHARLES H. DABNEY and others.

Our courts have no power nor authority over *foreign governments* nor over their *property*; notwithstanding such property is within *our territorial limits*.

Consequently, where funds of a foreign government are in the hands of its agents residing here, for the alleged purpose of being paid to creditors of that government who also reside here, the court here, being without jurisdiction over the principal—the foreign government, has no jurisdiction over its agents here. And being without jurisdiction over the parties, it cannot proceed in *rem* to dispose of its property in favor of resident creditors.

Special Term, March, 1868.

MOTION to continue an injunction.

In July, 1866, the Peruvian and Chilian governments issued conjointly, their bonds of five hundred and a thousand dollars each, amounting in the aggregate, as alleged, to two million two hundred thousand dollars. The bonds state that the governments of Peru and Chili had authorized the minister Plenipotentiary of Peru and the charge d'Affairs of Chili, accredited to the government of the United States, to raise funds and to issue bonds to represent the amounts raised. The bonds then declared that said governments of Peru and Chili were indebted to the bearer in the sum of five hundred dollars (or one thousand dollars) in American gold. Interest-coupons were attached, payable on the first day of January and July. They were made payable upon the following, among other conditions, namely: "That the bonds will be countersigned by Messrs Dabney, Morgan & Co., financial agents of the governments of Chili and Peru, at whose office the service of this debt will be performed." "The financial agents shall keep a register of the bonds actually issued, subject at all times to the inspection of the bondholders."

After providing for the mode of payment, the bonds state, that "in addition to the public faith pledged by the Republics of Peru and Chili and the general hypothecation of all national incomes to the security and service of this debt, the government of Peru hypothecates specially and exclusively to the payment of its interest and redemption, five hundred thousand tons of Peruvian guano from the deposits of the Chincha Islands, and gives to each holder of these bonds and their legal representatives, the right to take possession of said guano, and export it in the quantity required at the price of twenty-five dollars in gold per ton, on the failure of the above-mentioned governments to pay the interest or effect the redemption of the bonds, or any part thereof, in the manner hereinbefore provided." The bonds were signed "F. S. Barreda," with the seal of Peru, and "F. S. Baruaga," with the seal of Chili, and countersigned "Dabney, Morgan & Co., financial agents."

It was alleged by the plaintiffs that they were owners and holders of four hundred and sixty-four of such bonds, for one thousand dollars each, and of seventy-two of such bonds, for five hundred dollars each. That previous to their making the loans upon such bonds and in view thereof, they were assured by the defendants that the bonds were valid and properly issued, and a good security. Six months interest, it was alleged, would become due on the first day of January, 1868, and the plaintiffs allege that the defendants had in their hands the amount in gold sufficient to pay such interest, having received the same for that purpose from the republics of Chili and Peru, as financial agents thereof, and that the same was held by the defendants expressly for that purpose. It was further alleged that the defendants had informed the plaintiffs that they would not pay such interest falling due on the first day of January, 1868.

The relief demanded, was that the defendants be restrained from parting with such money received by them for the payment of such interest; that a receiver be appointed, and that

the money in the hands of the defendants be applied to the payment of such interest.

The suit was commenced on the 31st of December, 1867, and before the interest became due, and the right to an injunction was claimed on the ground of the defendants' announcement that they would not pay the interest falling due on the first day of the succeeding January.

Upon these facts a preliminary injunction was granted.

The motion now is, to continue the injunction pending the action.

Upon the motion, the deposition of Mr. Morgan, one of the defendants, was read. He stated among other things, that on the twenty-third of December, 1867, the defendants received notice from the Peruvian minister, not to pay the interest-coupons falling due on the first of January, 1868, on the ground, that the bonds held by the plaintiffs, had been unlawfully issued; that they had been deposited in Mr. Williams' hands, who, contrary to instructions and agreement, had misappropriated or misapplied them, and had no authority to part with them. He further stated, that the money in their hands, was the money of the Peruvian government.

H. A. CRAM, *for plaintiffs.*
C. TRACY, *for defendants.*

MONELL, J. No claim is made against the defendants in this case, founded upon any representation alleged to have been made by them in respect to the validity or value of the bonds. If any such claim was made, the representations stated to have been made by the defendants would, I think, fall far short of being sufficient to sustain a cause of action. They were merely expressive of an opinion of and a belief in the validity and value of the bonds, and contain no evidences of and fraudulent purpose on the part of the defendants.

Nor is there any question properly involved, in respect to the *bona fide* ownership of the bonds by the plaintiffs. For the purposes of the action, and upon the proofs before me, it appears that they made advances upon the security of the bonds, which were of the genuine issue of the Peruvian and Chilian governments, without any notice that they had been, as is now alleged, misappropriated or misapplied by some functionary or agent of those governments. Having received the bonds under such circumstances, it is not probable that the mere wrongful putting in circulation of genuine bonds payable to bearer, and transferable by delivering, by an agent of the obligors, having them in his custody would invalidate the title of a purchaser for value and without notice. This is upon the principle applicable to the diversion of notes or the wrongful issue of stock. (*Merchants' Bank* agt. *N. Y. & N. H. R. R. Co.*, 13 *N. Y. R.*, 599, 611), and is carried much further in respect to stolen bonds of a similar character.

Nor do I conceive that any inquiry into the sufficiency or insufficiency of the reasons assigned by the defendants for the non-payment of the January interest, is legitimately involved in the motion now before me. I am bound perhaps, to assume that such reasons were in fact sufficient, or were at least regarded as sufficient, by the Peruvian and Chilian governments, to authorize their withholding payment. At any rate, the defendants, the agents of, and acting under instructions from those governments would violate their trust and duty, if they disregarded or disobeyed such instructions; and they had no right either in respect to the interests of creditors or otherwise, to inquire into or question the sufficiency or propriety of the reasons assigned by their principals, or any direction they might see fit to make respecting the agency; nor indeed to require any reasons whatever.

The sole question then is, have the plaintiffs stated facts which in their legal effect, are sufficient to authorize the in-

terference by a court of equity, to compel the payment of money in the hands of an agent of a foreign government, to creditors of such government.

No action can be sustained by these plaintiffs against the Peruvian and Chilian governments. Our courts have no jurisdiction over foreign powers, and disputes or claims arising between or in favor of our own government or the citizens of our government and a foreign power can be settled only by treaty or by war.

Nor am I aware of any law under which the moneys in the defendants' hands can be impounded or attached at the suit of a creditor; or can in any other way be reached or applied to the payment of debts existing here against their foreign principals; and it is therefore probable, that the plaintiffs are without remedy, beyond such as is provided in the bond, or such as they may induce the government of the United States to resort to in their behalf. The only jurisdiction which by any pretense a court of equity could exercise in a case like this, is in exerting its restraining power to prevent, pending the litigation, a disposition of the fund provided for the payment of interest, which might deprive the plaintiffs of the benefit of such judgment as they might obtain. So far as any other relief is concerned, the remedies at law, would, if the plaintiffs have any remedy, be quite adequate.

But courts of equity, while they recognize and protect rights and redress wrongs, their jurisdiction over these subjects is confined to such rights or wrongs only, as are exclusively and exactly distinguished from that portion of remedial justice which is exclusively administered by courts of common law. And while courts of equity administer remedies for rights which are not recognized by courts of common law, the foundation which sustains the jurisdiction of either court is the same; and the cause of action must be such that the court can take hold of it and apply appropriate remedies and give appropriate redress.

There is no principle of equity which will sanction its assuming jurisdiction merely because at law there is no remedy, unless the facts are such as make up a case exclusively for equitable relief. In other words, there must be a cause of action, whether resort is had to the one forum or the other.

In this case it seems quite clear that the plaintiffs have not made out a claim for the equitable relief they seek to obtain. As before remarked, our courts have no power over the foreign principals, under whose authority and control the defendants can alone rightfully act. And being without jurisdiction over the parties, we cannot assert an authority over the property of such parties, notwithstanding such property is within our territorial limits. The fund in question, is the property of the Peruvian or Chilian governments, and not the property of the defendants, and there is no proceeding *in rem.* unless in actions over whose parties we have acquired or can acquire jurisdiction.

I cannot therefore discover any ground upon which this action can stand. I have endeavored to find some anology in principle applicable to equitable assignments or equitable liens, but without success. The plaintiffs cannot reach the fund because they cannot reach its owners. It is a misfortune, it may be a wrong, but our courts are without power, and the plaintiffs must be left to pursue such other course as may be open to them. If this act of repudiation is without justifiable reason, it should perhaps be (if not a *causus belli*), the subject of diplomatic negotiation between these foreign powers and the government of the United States.

The injunction must be dissolved with the usual motion costs.

N. Y. COMMON PLEAS.

Brockway agt. Brien.

The *first order*, in supplementary proceedings, appointing a referee, &c., *must be finished* or some order made by the court in the proceeding, before any other order can be made in the premises.

Special Term June, 1869.

Mr. Rust, *counsel for plaintiff, made a motion* for an attachment against defendant for contempt in dissolving an an order supplemental to execution, made by his Honor Judge Brady, dated June 1, 1869, commanding the defendant to appear before Thaddeus H. Lane Esq., referee, and submit to an examination as a judgment debtor.

J. M. Sheehan, *counsel for defendant*, admitted service of the order and the disobedience of it under his instructions; and rested his opposition on the fact that although seven or eight orders were granted for the examination of the defendant, and motions for attachment for contempt of each of them made against the defendant, they were all denied on the ground that the papers of the plaintiff's attorney were informal; but now, to settle the practice, he admitted the papers for contempt in the present motion were correct; but he objected to the jurisdiction of the court on the ground that in February last, an order was made herein appointing Felix V. B. Kennedy Esqr. referee, which order, though repudiated by the plaintiff, after obtaining the same, was still in existence, and that therefore the court had no jurisdiction of the proposed centempt.

Mr. Sheehan stated that he wished to make this a test case to settle the practice in supplementary proceedings, as

to his own knowledge great wrong was being done by changing referees and making orders while the first orders were still in force, and not set aside by any order of the court; and requested the judge to settle the practice, which was, up to this time doubtful.

DALY First Judge, coincided with defendants counsel, and decided that the first order in a supplementary proceeding must be finished or some order made by the court in the proceeding, before any other order could be made in the premises.

Motion denied.

N. Y. SUPERIOR COURT.

William J. O'Reilly and Others agt, James Freel.

On a motion to *vacate an attachment*, where the whole evidence, contained in the affidavits on both sides, show that the plaintiff could not have known the facts to which he swore positively in the affidavit on which the warrant of attachment was obtained, therefore there being no preponderance of evidence to sustain it, the attachment must be *discharged*.

In this case, the court considered that there might be evidence enough before it to establish that the defendant intended to retain control of his property, as long as the indulgence of his creditors and the law might permit; that he had found or would find it difficult to meet all his engagements as they had become or might become due; that he had made promises to pay which he had broken, and perhaps that he was in a precarious situation, if pressed by his creditors.

But there was no such evidence before the court, of hurry, secrecy and sacrifice in the disposition of his property as to warrant the deduction that he intended to withdraw from the grasp of the law his property, when his creditors are in a position to seize it. Until then he is the owner and entitled to dispose of it as he thinks proper, provided he does not violate any positive law.

Special Term, April, 1867.

Motion by defendant to vacate a warrant of attachment.

T. Brennan and John McKeon, *for motion.*

T. B. Eldridge *opposed.*

Robertson, Ch. J. The 227th section of the Code authorizes the issuing of an attachment against the property of a defendant, who, in general terms, has absconded or concealed himself, or has disposed of or secreted, or is about to dispose of or secrete, his property with intent to defraud creditors. The 229th section provides more specifically that a warrant may be issued whenever it appears by affidavit that the defendant has departed from this state with intent to defraud his creditors, or to avoid the service of a summons, or to keep himself concealed therein with like intent, or that he has removed, or is about to remove, any of his prop-

erty from this state, or has disposed of or secreted any of his property with like intent. As such last section reads, a departure of the defendant from this state, with any one of these intents, to wit: either to defraud his creditors, avoid the service of a summons, or keep himself concealed within this state, is sufficient to justify an attachment. Nothing can be implied in so summary a proceeding, and therefore the word "kept" cannot be substituted for "keep." If so the provision is contradictory as to such keeping concealed in the state, when he has departed from it. But even if the provision allowed an attachment where a defendant was concealed in this state, I think the affidavits on which this attachment was granted contained no evidence of such concealment, and if they did they were fully met and disposed of by the affidavits of disinterested parties; so that the attachment cannot be sustained on that ground, and unless it can be upon the ground of a past disposition, or an intended disposition of goods to defraud creditors, it must fail.

The action is on a promissory note for over $900; dated in October last, and goods sold in November and December amounting to nearly two hundred. Before such goods were bought, as one of the plaintiffs deposed in an affidavit on which the attachment was granted, the defendant applied to them representing that he had a cash capital of $10,000 in his business, owed no borrowed money, was doing a good business, was a single man with merely nominal expenses, owed no bills past due, was able to meet all his bills, amounting to $2,000, and had a stock of goods in his store amounting to $15.000 at its cost price. Two days after such note became due, being the 22d of February last, the defendant had in his store goods of the value of $15,000, and now has goods valued at $5,000. The defendant has not, within forty days, paid any of his bills, but has allowed all his paper to go to dishonor for non-payment, although selling his goods below actual cost, to deponent's certain knowledge, thereby inducing a run upon his store by custo-

mers; is largely in debt and refuses to make any provision for the payment of his debts, although his stock of goods is disappearing. Such debts, past due, amount to $10,000, many of which have been due for thirty days. His average daily sales for thirty days have been $200 each day, no part of which has been applied to the payment of his debts, and the deponent was informed by a clerk, of the defendant (McGowan) that the defendant was selling everything paying nothing, and evidently preparing to go out of business. The names of some creditors are given, and a statement of the defendant that he has paid $800 to one of them (Weeks) is sworn to have been denied by such creditor. There is a general charge that the defendant has disposed of, is disposing, and about to dispose of his property to defraud his creditors, which of course amounts to nothing (*Furman* agt. *Walter*, 13 *How. Pr. Rep.*, 349), as it is for the court, not the creditor, to say whether facts proved to exist establish such disposition and intent.

Such affidavit of the plaintiff does not state the nature of the inspection which enabled him to pass upon the value of the goods in the store, or how he knew that the defendant had not for forty days paid any of his bills, or had allowed his paper to be dishonored, or what the cost of his goods was, and that he was selling them below it for three weeks, or how much he was in debt, or when his debts were due, or what the average daily sales of the defendant were, or that the proceeds of such sales were not appropriated to the payment of his debts. As the possession of such knowledge by any one who was not with the defendant, night and day, is almost impossible, it seems incredible, and a strong shade of suspicion is cast over the reliability of the statements. Such things may all have been true, but the party testifying does not shield himself from the charge of perjury thereby, if he did not know them to be true They may have been stated in that positive way to avoid the difficulty of stating them on information and belief, which would not

warrant the issuing of an attachment. [*See cases cited in note* (*d*) § 229 *of Code of Proc.* (*Voorh. Ed.*, 1864); *p.* 148.] But if made only as the result of information and belief, the party making such statement under oath incurred the penalties of perjury, if they were material, and they were only so if they tended to prove a previous or an intended fraudulent disposition of the goods, which I propose to consider.

It is conceded by such affidavit that except as to selling below cost, the sales were made in the ordinary course of business, and at the rate of $200 a day for thirty days, which would amount to $6,000. Yet, on the 12th of March, the day of making the affidavit, it states the stock of goods to be $4,000, while on the 25th of February, (two days after the note became due,) it was $9,000, making a disappearance of $5,000 in fifteen days—being at the rate of $333 a day. The fact that the defendants' creditors resident in the city of New York, to whom $10,000 are due, and some of whose claims have been over thirty days due, have not interfered with his regular business by judgment and execution, would tend to show that such creditors were still willing to trust to his future success, and his failure to pay them is certainly not a matter of which the plaintiffs can avail themselves.

The fact to be established is not mere inability or failure to pay, but an unlawful disposition of property to avoid such payment. Embarrassment owing to the pressure of creditors may characterize secret, swift and wholesale disposition of property, or other circumstances of concealment, so as to infer an intention to defraud. But in case of a non-interference by creditors, the amount of sales of goods in an ordinary way over a counter to casual customers, even below cost, is very faint evidence of an intent to defraud by such disposition of them. The amount of rebate from the cost in such sales is not given, so that any very strong inference from that circumstance is prevented.

Upon the whole, therefore, there was perhaps, just enough of possibility of knowledge by the plaintiff, Stephen O'Reilly, of the facts to which he swore positively, and enough of room for the inference that the sale of $6,000 worth of goods under cost, although openly to casual customers, and during thirty days, was a disposition of property to defraud some creditors, where the defendant was in debt $10,000, as to justify the issuing of the warrant of attachment in question, although it is nothing like as strong as the evidence of an intended removal of goods for a similar purpose was in *Mott* agt. *Lawrence*, (17 *How. R.*, 559,) where an attachment was set aside for the grounds of issuing it being insufficient. The supplementary affidavits on the part of the plaintiffs do not strengthen their case much. They consisted in part of the valuation by several persons conversant with the dry goods of the defendants' stock, by looking at them on the shelves, without any further examination.

These witnesses undertake to pronounce upon them as shop-worn, and the relics of a good stock, and to state that the best and most saleable goods are gone. Of course it is difficult for an inexperienced person to set limits to the judgment and penetration of an expert, but it is very difficult to imagine how any one could ascertain from what goods were in the store, from what had been there, or how they were shop-worn, without examining them, and the process of doing so could surely be explained to the unlearned. There has been abundance of time since the sheriff was in possession to take an inventory and ascertain the value of material. The fact that the plaintiffs were once prevented by the person in charge, would not have prevented them from applying to the sheriff for his removal if necessary, particularly after the directions of such sheriff given by him.

The plaintiffs seem to admit that the goods bought of them in November and December, at least, are still in the shop, by offering to take them back in satisfaction. The

plaintiffs own affidavit in regard to the statement of one of the defendants' clerks, (McGowan,) is denied by such clerk. His statement that the defendant sought him to make purchases is denied by the latter. The sale of goods at Terre Haute is admitted by the defendant, but proved to have taken place in November last. The conversation between one of the plaintiffs (Stephen O'Reilly) and the defendant, reported by an unusual effort of memory by a Mr. Kross, (who does not seem to have taken any minute of it in writing,) in the form of question and answer, was somewhat inquisitorial and might have provoked the defendant's replies from its tone; at all events, did not intend to show any fraudulent disposition of property, although it might to prove an indisposition to satisfy the plaintiff. But the affidavits on the part of the defendant contradict everything material on the other side to the issue of a past or a future fraudulent disposition of property. They establish, by parties who are familiar with the defendant's stock, and have daily handled it for a long time past, that it is worth from $15,000 to $20,000. Their statement, it is true, is general, but it is opposed to an equally general one. The defendant's clerks also testify, that instead of $200 worth of goods a day, the defendant has not sold over $30 worth for the last thirty days, and they prove the dullness of the business. Sales under the original cost are also denied, except as to old goods out of fashion and difficult of sale. The representations to the plaintiffs on which they allege goods were sold to the defendant are also denied. And the whole evidence contained in all the affidavits on both sides, show that the plaintiff, Stephen O'Reilly, could not have known the facts to which he swore positively in the affidavit on which the warrant of attachment was obtained. There is, therefore, no preponderance of evidence to sustain them.

There may be evidence enough before me to establish that the defendant intends to retain control of his property as long as the indulgence of his creditors and the law may

permit: that he has found or will find it difficult to meet all his engagements as they have become or may become due; that he has made promises to pay which he has broken, and perhaps that he is in a precarious situation if pressed by his creditors. But, as I have before said, there is no such evidence before me of hurry, secresy and sacrifice in the disposition of his property as to warrant the deduction that he intends to withdraw from the grasp of the law his property, when his creditors are in a position to seize it. Until then, he is the owner, and entitled to dispose of it as he thinks proper, provided he does not violate any positive law. The attachment must be dissolved with $10 costs.

In the case of *George A. Wickes et. al.* agt. *The same defendant*, the court said: "The facts in this case are so nearly similiar to that in *O'Reilly &c.*, agt. *The same defendant*, that the same disposition must be made of the motion by granting it with $10 costs.

COURT OF APPEALS.

DEWITT C. GRAHAM and others, executors of DAVID GRAHAM agt. PETER CHRYSTAL.

On the trial of an action brought by executors, for services of their testator as an *attorney and counsellor at law*, the defendant being a witness on his own behalf, should not be permitted to give the substance of a *written* any more than that of a verbal communication to him from the testator; even if the loss of the written communication is satisfactorily made out.

Besides, it would hardly be safe to allow the contents of a lost written instrument to be proved by such witness, who stated in answer to a question having reference to the writing, that "his recollection was too vague and shadowy—he thought that perhaps he might state the substance.

Where plaintiffs sought to impeach two of the defendants witnesses, by witnesses who swore that they had known them in former years: that their character was bad, and though they knew nothing of them for eight or ten years prior to the trial, they would not believe them under oath:

Held, that the evidence was properly admissible. The rule is, that if it is shown by the impeaching party that the character of the witness at a former period of his life had been bad, and thus a presumption is raised that it had so continued, it is in the power of the party thus sought to be impeached, to show that his present character is good, and thus repel the presumption.

Interest was allowed on the plaintiffs claim from the time when the last professional services were rendered, on the sum which the plaintiffs claim was then due.

A general *exception* to all the findings of the referee, both of law and fact except as to some enumerated ones, is not a sufficient exception to the *allowance of interest*.

It was stated that this whole case showed that the defendant was probably saved from a long and disgraceful imprisonment by the great professional skill and perseverance of the testator, in his defense; and the value of the services, $1250, were abundantly proved and found by the referee; and no exceptions on the trial were taken.

September Term, 1865.

APPEAL by the defendant from a judgment in favor of the plaintiffs, rendered at the general term.

HARRISON and WARING, *attorneys, and*
JOHN E. BURRILL, *counsel for appellant, defendant.*
CARPENTIER and BEACH, *attorneys and counsel for respondents, plaintiffs.*

CAMPBELL, J. The action was brought by the executors of the late David Graham to recover for professional services

rendered by him for the defendant between October, 1845, and June, 1850. The referee found that the services were rendered both as attorney and counsellor, and that the defendant had promised to pay him in the most liberal manner; and that such services were reasonably worth the sum of one thousand two hundred and fifty dollars, of which sum only two hundred and fifty dollars had been paid, leaving due the sum of one thousand dollars and interest; but inasmuch as the plaintiffs had in their complaint only claimed to recover eight hundred and fifty dollars and interest—he ordered judgment for the latter sum.

The statute of limitations was interposed as a defense in this action, but was abandoned on the trial, it being conclusively established that the defendant had been, for the greater part of the time intervening between the rendering of the services and the commencement of this action, absent from the state. The value of the services were abundantly proved, not only by men eminent in the profession, but by those who were familiar and employed in the very criminal proceedings instituted and carried on against the defendant.

The principal contest on the trial, was on the question of payment; the defendant contending and giving some evidence tending to show that the two hundred and fifty dollars paid, had been received by Mr. Graham during his lifetime in full satisfaction and extinguishment of his claim for the services rendered.

In the progress of the trial, the defendant who was examined in his own behalf, testified, that he had received from Mr. Graham certain letters relating to monied transactions, and that he had looked among his papers and could not find them. When asked whether he could state the contents of them, he answered; "No, I could not state the precise words, but I think I could give the substance *perhaps.*" When asked by his counsel to state the substance, objections were made and sustained and exceptions were taken.

The writer of the letters had been dead for a number of

years at the time of the trial, and the action was by his executors, and it is to my mind very doubtful, whether the defendant testifying in his own behalf, even if the preliminary proofs of loss had been made out to the satisfaction of the referee, should have been permitted to give the substance of a written any more than that of a verbal communication to him; in either case the testator could not be present to contradict, to vary or explain, but the referee was not satisfied with the evidence of the loss of the letters, and of the sufficiency of this evidence he was to determine (*Jackson* agt. *Frier*, 16 *Johns.*, 193). But it was evidently right that the objection should be sustained on the ground, apparent from the answer of the defendant—that his recollection was too vague and shadowy. He thought that perhaps he might state the substance—it would hardly be safe to allow the contents of a lost written instrument to be proved by such a witness; I think the objection was well taken.

The defendant called two witnesses, Little and Porter, whom the plaintiffs sought to impeach. The impeaching witnesses had known the men Little and Porter in former years, and testified that their character was bad, and though they knew nothing of them for eight or ten years prior to the trial, were allowed further to testify that they would not believe them under oath.

The ruling was right and the evidence properly admitted. If not the most satisfactory, it was still competent. (*Sleeper* agt. *Van Middlesworth*, 4 *Denio.*, 431.) In this case, the inquiry was as to reputation four years previous, and it was truly said that no certain limit in point of duration could be laid down for such inquiries. If it is shown by the impeaching party that the character of the witness at a former period of his life has been bad and thus a presumption is raised that it had so continued, it is in the power of the party thus sought to be impeached to show as he did by witnesses in this case, that his present character is good and thus repel the presumption.

The defendant now contends that interest should only be allowed from the commencement of the suit, whereas the referee allowed interest from June 1850, the time when the last professional services were rendered. On principle there is no good reason why interest should not be allowed as claimed by the plaintiffs and found by the referee; when the services were rendered, they were worth the sum which the referee found as their value, and said sum was then due, and if not paid by reason of the inability or unwillingness to pay on the part of the defendant and said payments were deferred or delayed for several years, then full compensation as payment is only made when interest is added to said principal sum. But this case falls within the exception to the general rule as determined by *McMahon* agt. *New York and Erie R. R.* (20 *N. Y.*, 463). The defendant before the services were rendered, and while the criminal proceedings were pending, left the state and remained out of it, and his residence was unknown to the testator. He took no steps to ascertain his indebtedness, and gave no opportunity for a claim to be made or presented to him. He was clearly himself in default and cannot now complain that he is compelled to pay interest. Besides, there is no special exception to the allowance of interest; the exception is general to all the findings, both of law and fact, except as to some enumerated ones—as was said in *McMahon* agt. *New York and Erie R. R.* (*supra*), the exception to be of avail, should have pointed out the precise objection so that the plaintiffs might have had their election to remit the excess of interest.

There are no other exceptions that require any attention. The whole case shows, that the defendant was probably saved from a long and disgraceful imprisonment by the great professional skill and perseverance of the testator in his defense, and the value of the services they abundantly proved and found by the referee, and no exceptions on the trial were taken.

This judgment should be affirmed.

COURT OF APPEALS.

JAMES H. CASE, respondent agt. HIRAM G. HOTCHKISS, appellant.

On the trial of an action brought for services as an *attorney and counsellor at law*, where the attorney was on the stand as a witness, and had testified that an appeal in a cause was taken to the general term, under the defendants direction; the defendant's counsel then asked the witness the following question in reference to that appeal: "Was there anything to argue?" The question being objected to was excluded by the court, and the defendant excepted:

Held, no error. The obligation of the attorney to be in attendance, by himself or counsel, was the same in either case, and the fact that there was nothing to argue in the sense intended by the question, would have been no proper ground of inference that it was not in fact argued, in the legal sense of submitting the case to the general term for decision.

No objection to the *account* rendered by the attorney, having been made by the defendant until the commencement of the action, being over two years after such presentation, it was properly regarded as an account stated, and drew *interest from the time it was rendered.*

January Term, 1867.

THIS is an action to recover for the services of the plaintiff's assignors, as attorneys and counsellors at law.

GEORGE H. ARNOLD, *for plaintiff and respondent.*
D. H. DEVOE, *for defendant, appellent.*

PARKER, J. Only two exceptions appear in the case to have been taken upon the trial, and these raise the only questions which we can consider.

The first was to the decision of the court sustaining the plaintiff's objection to the following question put by the defendant's counsel to the plaintiff's witness on cross examination: "Was there anything to argue?" The question referred to the argument of an appeal at the general term, in an action which the plaintiff's assignors defended for this defendant. The witness (who was one of the said assignors)

had already testified that the appeal was taken under defendant's direction, which evidence was uncontradicted in the case, and that he and his partners had paid other counsel for auguing it at the general term. The manifest point of the inquiry, was not whether the case was before the general term in a condition to be argued, but either, whether there was any question presented for argument in the case as made, or, whether there were any merits in the question presented to the court. Whatever was intended, the question was properly excluded. Whether the case presented to the court any question for its consideration, or whether the question presented had any merit or not, was quite immaterial inasmuch as the attorneys had been employed by the defendant to carry the case to the general term and were thereupon bound to see that it received the attention necessary to obtain the decision of the general term, sought for by the appeal. Neither was it material with reference to the question whether an argument was in fact had.

The obligation of the attorneys to be in attendance, by themselves or counsel, was the same in either case, and the fact that there was nothing to argue in the sense intended by the question, would have been no proper ground of inference that it was not, in fact, argued, in the legal sense of submitting the case to the general term for decision. Besides, it became a matter of no importance in the case, from the fact that it was subsequently shown that the amount was liquidated by the defendant's admission, and no question, was made as to the amount.

The other exception is to the charge of the judge, in which he instructed the jury that they might allow interest upon the amount of the account. It appeared by uncontradicted evidence that the account, as claimed in the complaint, was rendered to the defendant, on the 25th of January, 1859, and no objection was ever made to it, in respect to the amount or otherwise, prior to the commencment of the action, which was more than a year, and the trial was

had over two years after such presentation. The account was, I think, properly regarded as an account stated (*Lockwood* agt. *Thorne*, 1 *Kern.*, 170; *Towsley* agt. *Denison*, 45 *Barb.*, 490; *Philips* agt. *Belden*, 2 *Ed. ch. R.*, 1).

Being so regarded, it drew interest from the time when it was liquidated, which was at the time when it was rendered, inasmuch as no objection was ever made to it (*Walden* agt. *Sherburne*, 15 *John.*, 409; *Patterson* agt. *Choate*, 7 *Wend.*, 441; *Feeter* agt. *Heath*, 11 *Wend.*, 479).

On the merits, therefore, the judgment is clearly right, and should be affirmed.

But, moreover, the appellant, when the cause was reached on the calendar, neither appeared to argue, nor subsequently furnished papers for the court. For this reason the respondent is entitled to an affirmance of the judgment, and I think also to ten per cent. damages for the delay occasioned by the appeal.

N. Y. SUPERIOR COURT.

WILLIAM M. LOWRY and another agt. WILLIAM H. INMAN.

Except in the single instance of a misjomder of causes of action, the opportunity of *amendment of the complaint*, in the contingency of a successful demurrer to it, is left absolutely to the discretion of the court, to be exercised in conformity to the rules of the former practice and in furtherance of justice.

It would not be in furtherance of justice, to allow an amendment of the complaint, with no other view than that the plaintiffs might have the privilege of looking about to see if they could not discover some means of reinforcing their case.

A final judgment on a demurrer is a "trial" under section 309 of the Code, and the prevailing party in a proper case, is entitled to an *additional allowance*.

Special Term, June, 1869.

THE defendant moves for an additional allowance, and the plaintiffs move for leave to amend their complaint.

ROGER A. PRYOR, *for defendant.*
BARLOW & HYATT, *for plaintiffs.*

MCCUNN, J. As the former motion can be entertained only when final judgment is to be entered on the demurrer, its decision is necessarily postponed to the disposition of the motion to amend. A demurrer to the complaint for insufficiency in substance was sustained, and judgment directed for the defendant. The plaintiffs ask leave to amend their complaint.

Section 172 of the Code makes provision for the privilege of pleading over when the demurrer has been defeated; but, except in the single instance of a misjoinder of causes of action, the opportunity of amendment in the contingency of a successful demurrer to the complaint is left absolutely to the discretion of the court, to be exercised in conformity to the rules of the former practice and in furtherance of justice. Now, under the ancient practice the liberty of amend-

ment of a complaint, after it had been adjudged bad on demurrer, was by no means a thing of course, or of common occurence, on the contrary the judgment was ordinarily final —*nil capiat.* And if the plaintiffs were allowed to amend it was an exceptional privilege, conceded to prevent a failure of justice—as when the judgment on demurrer might be pleaded in bar to another action, or another action be precluded by the statute of limitations. In the case under consideration neither of these difficulties will occur, and the plaintiffs may bring another action without being estopped by the judgment on demurrer or shut out by a plea of the statute of limitations.

On what equity, then, do the plaintiffs found their prayer for leave to amend? They have already amended once. The original complaint being demurred to, they served an amended complaint, and it was this amended complaint that was adjudged insufficient. It is hardly probable that they brought their action in the first instance without a careful survey of the ground on which they were to stand; and having already availed themselves of the opportunity to retrieve their mistakes, they are not in a position to plead improvidence or inadvertence. But the plaintiffs present to the court no ground of amendment. They do not even admit that their complaint was defective; they point out no infirmity: and if infirmity exist, they fail to show that it may be repaired. Very frankly they ask the privilege of amendment, with no other view than that they may look about and see if they cannot discover some means of reinforcing their case. I doubt if a request to amend were ever made under such circumstances. I am sure it was never granted under similar circumstances. In the nature of the case an amendment of the complaint is impossible.

The decision of the demurrer turned exclusively on the construction of the statute set out in the complaint. The decision of the court was that under no circumstances would that statute support an action against the defendant.

Obviously, then, since this statute is the only ground of action alleged against the defendant, and since the decision is that the statute is insufficient to support an action, the plaintiffs, by no possible amendment, can exhibit a cause of action. To allow an amendment would be of no benefit to the plaintiffs, but would only involve a delay of justice and an accumulation of expense.

The plaintiffs are not without relief. They may either appeal from the judgment, and so reverse the error of the court below—if there be error in my construction of the statute—or they may commence a new action on such a state of facts as they choose to exhibit.

The motion for leave to amend is denied, but without costs.

The motion for an additional allowance is granted. The case was "difficult and extraordinary" in a very emphatic sense; and a final judgment on a demurrer is a "trial" under section 309 of the Code. The additional allowance is five per cent on the amount claimed.

SUPREME COURT.

JOHN P. AMES agt. JOHN E. RATHBUN and ECKLEY W. STEARNS.

Advice of counsel, given upon a full and fair statement of the case, and acted upon in good faith, is no doubt a good defense to an action for *malicious prosecution*.

But where the statement on which such advice is given, corresponds in all respects with the facts contained in the affidavit upon which the plaintiff was arrested; which affidavit states that the plaintiff *falsely and fraudulently* represented to the defendants that &c. And on the trial, the jury find that there was no probable cause for the accusation of fraud, there is no ground for saying that the statement to counsel was fairly made or that it was in good faith acted upon.

Second District, General Term, July, 1869.

Before LOTT, *P. J.*, GILBERT, BARNARD *and* TAPPEN, *Justices.*

THIS action was brought by the plaintiff against the defendants to recover damages for a malicious prosecution: The plaintiff was arrested by the defendants in a justice's court in New York city. The action in which he was arrested was for fraud, the defendants alleging that he had obtained money from them by means of false and fraudulent representations. He gave bail, and on the adjourned day the respective parties appeared and proceeded with the trial, and the justice, after hearing the proofs in the case, dismissed the complaint.

One of the defendants died, leaving no property; the other one has availed himself of the bankrupt act. The action has been tried three times, and each time a verdict was rendered for the plaintiff, except the first, and then the jury did not agree.

GEORGE W. RATHBUN, *attorney, and*

WILLIAM W. MANN, *counsel for defendant.*

I. There are three indispensible propositions to be *affirmatively established,* before a recovery can be had in an action for malicious prosecution.

1. Want of probable cause for the prosecution complained of; 2, malice, and 3, an end of the prosecution. An absence of either one of these elements is fatal. (*Palmer* agt. *Avery*, 41 *Barb. R.*, 290; *Hall* agt. *Suydam*, 6 *Id.*, 83; *Bulkley* agt. *Kettletas*, 2 *Seld.*, 384, *and* 2 *Duer*, 261; *Masten* agt. *Deyo*, 2 *Wend.*, 424.)

Was there probable cause for the warrant of arrest against John P. Ames, in the first district court of New York? We contend that the words "*probable cause,*" do not fully characterize the claim and rights of Rathbun and Stearns in that action. We insist that they had a *positive right of action for a demand fraudulently contracted,* in which they were entitled as a matter of right to a warrant of arrest under the third subdivision of section 16 of the New York justices court act of April 18, 1857. This debt and its fraudulent inception was sworn to by the defendant, Stearns, in his affidavit, used before the justice, and was substantially proven on the trial in the circuit, by the witnesses, Henry E. Brown and Frederick A. Mason—besides this, the certificate signed "C. Vielie," on which Ames drew the $41.40, was a fraud on its face, in the getting up of which and drawing money thereon, Ames was a participator, for he knew at the time that "C. Velie *was the captain,* and the paper itself indicating that the signer *was not the captain.* The fraud is established by testimony, both oral and documentary, and the only contradicting testimony was the oath of Ames himself, when he swears to the most improbable statement, that is, that he told Brown when he handed him that paper, "here is what the captain says about the discharging."

In *Palmer* agt. *Avery* (41 *Barb.*, 290), the court hold that the plaintiff in an action like this, is not competent to

prove by *his own oath* against that of the defendant, that a former judgment was got against him by the defendant's perjury, when the question depends on their credibility as witnesses. If not so competent, then the plaintiff's case is without a particle of testimony, for the plaintiff is the only witness on his side to any material fact.

The facts admitted in the stipulation read in evidence by plaintiff's counsel, show probable (and ample) cause for the arrest. It is there admitted that the defendants "claiming to have a good cause of action, &c.," took the proceedings set forth in the answer, which led to the arrest of plaintiff. The plaintiff has no right to insist that such *claim* was in bad faith. It is tantamount to saying that they *honestly claimed*, which would of course defeat the action.

The plaintiff was discharged from the arrest before the justice, on the ground that in receiving the $41.40, he was the agent of CaptainVielie. The question of agency was one of the issues.

The law is well settled, that where a party is sued for a fraud committed by him, he cannot escape liability by showing that he acted as agent. (*Hecker* agt. *DeGroot*, 15 *How. Prac. Rep.*, 314.)

It is not necessary that he should be benefited by the fraud to make himself liable, or collude with a party who was. (*Hubbard* agt. *Briggs*, 31 *N. Y. R.*, 518, 520; *Palsley* agt. *Furmun*, 3 *Term, R.* 51; *Hammond* agt. *Hudson River Iron Machine Co.*, 20 *Barb.*, 378.)

A party making a representation false in fact, renders himself liable *to an action for fraud, although he did not actually know the representation to be false at the time*—and a party making a material representation *without knowing whether it is true or false*, and it turns out to be false, an action lies against him for the fraud. (*Craig* agt. *Ward*, 36; *Barbour*, 377; *Bennett* agt. *Judson*, 21 *N. Y. R.*, 238; *Sharp* agt. *Mayor of N. Y.*; 25 *How. Pr. R.*, 389.)

II. A very essential ingredient to an action for malicious prosecution is *malice*. It must be *malice in fact*, as distinguished from malice in law. (*Bulkley* agt. *Smith*, 2 *Duer.*, 261; 41 *Barb.*, 290). It must be shown affirmatively, and the onus of proving it lies upon the plaintiff. (*id.*)

In this respect the plaintiff's case is as bare as upon the point of *probable cause*. Not only was there no malice shown, but the reverse appears from the evidence introduced by the plaintiff. The advice of counsel in favor of said arrest, as one of the facts set up in defendants' answer as a part of the proceedings adopted, preparatory to the issuing of the warrant of arrest, is admitted by the stipulation (*see case, fols.* 62 *to* 66), and sworn to by the witness G. W. Rathbun, (*fols.* 93 *to* 99). Such advice of counsel fairly given and acted upon, *is an absolute bar to the action*, as rebutting all inference of malice. (*Hall* agt. *Suydam*, 6 *Barb. R.*, 83; *Stone* agt. *Swift*, 4 *Pick.*, 380; *Ravenga* agt. *McIntosh*, 2 *Barn. and Cress.*, 693).

III. A dismissal of the complaint in the New York district court, is not such a termination of the prosecution as will enable the plaintiff to maintain this action. (*Bacon* agt. *Townsend*, 6 *Barb.*, 426.)

The complaint does not even allege a termination. (The amendment allowed on the trial barely alleges that the complaint was dismissed.) It was intended first as a complaint for false imprisonment, but on the principle laid down in *Van Latham* agt. *Libby*, (38 *Barb.*, 339). The decision of the justice granting the warrant, *protects the party as well as the officer*. He now attempts to turn this into an action of malicious prosecution. It was necessary to amend the complaint before he could do that, and in *Waldhiem* agt. *Sickel*, (1 *Hilton*, 45); the New York common pleas hold that he cannot do it. The court therefore erred in allowing the amendment.

IV. This court erred in submitting the question of probable cause to the jury. (*See judges charge.*) *Bulkley* agt.

Kettletas, 2 *Selden*, 384; *Same Case*, 2 *Duer*, 261; *Pangburn* agt. *Bull*, 1 *Wend*, 345, 352; *Hall* agt. *Suydam*, 6 *Barb.*, 83; *Masten* agt *Deyo*, 2 *Wend.*, 424, 428; 7 *Cow*, 715.)

In an action for malicious prosecution, the question of probable cause for the prosecution, however numerous or complicated the facts on which it depends is one of law and not of fact, and in regard to which the judge who tries the cause is bound to express a positive opinion. (2 *Duer*, 261.)

If the judge leaves it to the jury to determine, not only whether the facts alleged are true, but whether if true they prove a want of probable cause—*he commits a fatal error*—(*id.*)

Where the existence of facts constituting probable cause is admitted or established, the presumption of law is that the defendant entertained and acted upon the belief, which the facts thus known to him justfied him in holding. Hence unless this presumption is repelled by proof on the part of the plaintiff, the question of the actual belief of the defendant ought not to be submitted to the jury. (*id.*)

"When it appears in an action for malicious prosecution, that the plaintiff by his own folly or fraud, exposed himself to a well grounded suspicion of guilt, this alone is sufficient evidence of probable cause." (*Per* WASHINGTON, J. *in Wilmarth* agt. *Mountford*, 4 *Wash. C. C. R.*, 82; *cited and approved in* 2 *Duer.*, 261. *See also Baldwin* agt. *Weed*, 17 *Wend.*, 224.)

Advice of counsel in favor of the prosecution fairly given and acted on, *is an absolute bar to this action.* It repels the presumption of *malice*, an indispensible ingredient to the action. (*Hall* agt. *Suydam*, 6 *Barb. R.*, 83; *Stone* agt. *Swift*, 4 *Pick.* 380; *Ravenga* agt. *McIntosh*, 2 *Barn. and Cress.* 693.)

VI. Under the law as laid down in *Bulkley* agt. *Kettletas*, above cited (*in Selden and in Duer*,) the judge ought to have non-suited the plaintiff, or directed a verdict for the defendant.

We do not complain, that the charge contained any wrong principle of law in reference to actions for malicious prosecution. The error complained of, is that the *judge submitted the question of probable cause to the jury. (See judges charge.)* We contend that his honor should have reserved to himself the decision of that question, leaving to the jury to decide upon any disputed question of fact, bearing upon that point (2 *Selden*, 384). If the judge should determine upon the undisputed facts or upon the facts found by the jury, that their was probable cause, he should have directed a verdict for the defendants.

A new trial will be granted on a *case made* on the ground of a mis-direction of the judge, though no exception was taken to the charge. (*Archer* agt. *Hubbell*, 4 *Wend.*, 514 *and* 517 *note*; *Wardwell* agt. *Hughes*, 3 *id.*, 418; *People* agt. *Holmes*, 5 *id.*, 191, 199; *Sayer* agt. *Townsend*, 15 *id.*, 647.)

VII. In this case, there being probable (yes positive,) cause for the warrant of arrest, and an entire absence of malice, the verdict is against law, and a new trial should be granted with costs to abide the event. (*Baldwin* agt. *Weed*, 17 *Wend.*, 224; *Masten* agt. *Deyo*, 2 *id.*, 424; 2 *Duer*, 261; 4 *Wend.*, 514, 517.)

VIII. Where a new trial is granted for misdirection of the judge or as against law, costs, abide the event, (7 *Cow.*, 456), so when the verdict is set aside, as contrary to law. (*Hullock*, 387; *Cowper*, 808; 1 *W. Blackstone*, 570; 3 *Term R.*, 551, 553.)

If the verdict is set aside as against the evidence, and also as being contrary to the charge of the judge, the costs will abide the event. (9 *Wend.*, 60.)

OSCAR FRISBIE, *attorney and counsel for plaintiff.*

I. The proceedings instituted in the justice court, whereby plaintiff was arrested, were without probable cause.

The defendants knew that the plaintiff came to them in the capacity of an agent for the Protection Transportation Company; that he collected the money as such agent; that he made no allegations as of his own knowledge that the discharging money had been paid, but, on the contrary, produced a paper signed by the captain of the vessel, and when he presented it, said: "There is what the captain says about this discharging—he says he paid it, and signed that writing to that effect." One of the defendants was present and heard the conversation between their clerk and plaintiff in respect to the transaction. The defendant, Stearns, made the affidavit upon his own knowledge.

II. The facts as to whether there was probable cause for the arrest, were fairly submitted to the jury, as they should have been, and they found in plaintiff's favor. The court will not disturb such finding.

The facts adduced as a proof of a want of probable cause are controverted, and if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury. (*Besson* agt. *Southard*, 10 *N. Y.*, 236.)

The facts were conflicting, and the credibility of witnesses was to be passed upon.

III. A person's belief in a charge made by him, when arising from his own negligence in examining the evidence within his reach, does not constitute probable cause for such charge. (*Grinnell* agt. *Stewart*, 32 *Barb.*, 544; 12 *Abb. Pr.*, 220; 20 *How. Pr.*, 478.)

Slighter evidence will prove the want of probable cause than is necessary to establish an affirmation. (*Haupt* agt. *Pohlmann*, 16 *Abb. Pr.*, 301.)

IV. The defendants acted maliciously in arresting the plaintiff. They made statements to the judge for the purpose of having the plaintiff arrested, with the knowledge that they were untrue. They falsely represented the facts.

The question of malice is one for the jury.

V. Although malice is not necessarily inferable from the want of probable cause, yet the circumstances showing the want of cause may also justify the inference of malice. (*Vanderbilt* agt. *Mathis*, 5 *Duer.*, 304; *Burhans* agt. *Sanford*, 19 *Wend.*, 417; *McKown* agt. *Hunter*, 30 *N.Y.*, 625.)

VI. The previous suit was terminated before the present one was commenced.

VII. The advice of counsel only goes in mitigation of damages, under any circumstances: and when the facts are incorrectly or wilfully misrepresented, it amounts to nothing. (6 *Barb.*, 83.)

There is no evidence showing that the defendants believed the statements made before the justice or to their counsel: they must believe in their cause. (*McKown* agt. *Hunter*, 30 *N. Y.*, 625.)

VIII. There was no exceptions taken to the charge of the court; the exceptions now come too late to avail the defendants anything.

IX. The court was correct in allowing the amendment. It was in the discretion of the court, and cannot be reviewed here. (*Sec.* 173 *of the Code, and case cited under it.*)

X. The judgment should be affirmed.

By the court, GILBERT, J. The only exception taken by the defendants, was to the admission of evidence of the dismissal of the complaint in the action in which the plaintiff was arrested, The objection to this evidence was, that the complaint contained no averment of the fact sought to be proved. But it was at once obviated by an amendment allowed by the court, to which no exception was taken. The evidence, therefore, was properly received, even if the amendment was improperly allowed. But we are of opinion that the amendment was properly allowed. The complaint contained all the averments, requisite to maintain an action on the case for a malicious prosecution, except the averment, that the prosecution was ended. The only effect of

the amendment, was to supply this omission, and this is clearly within § 173 of the Code.

It has been urged on this appeal, that the evidence fails to make out a want of probable cause or malice, and therefore, that the plaintiff should have been nonsuited. Although no motion for a non-suit was made, and the case was submitted to the jury under a charge to which no exception was taken, we might review the facts as well as the law, and set aside the verdict in the exercise of the power conferred upon the court by § 329 and § 349 of the Code, because the appeal is both from the judgment and the order denying a new trial. (*Macy* agt. *Wheeler*, 30 *N. Y. R.*, 235; *Parker* agt. *Jarvis*, 34 *How. P. R.*, 256; *Keese* agt. *Devlin*, 3 *E. D. Smith*, 523; *Pumpelly* agt. *Oswego*, 13 *Abb.*, 387; *Same* agt. *Bailey*, *Abb. N. S.*, 407.)

But upon a review of the case we are unable to say, that the evidence is insufficient to warrant the verdict, or that the jury were misled by any misdirection. The jury must have believed the testimony of the plaintiff. Upon this it can hardly be contended, that there was not a want of probable cause, for the unqualified statement, contained in the affidavit, on which the warrant of arrest was issued. The question of malice was properly submitted to the jury. The remarks of the judge, respecting the effect which ought to be given to the advice of counsel were accurate, and were quite as favorable to the defendants as the evidence warranted. Advice of counsel given upon a full and fair statement of the case, and acted upon in good faith, is no doubt a good defense to an action for malicious prosecution. The testimony of Mr Rathbun, the counsel, was, that the statement on which his advice was sought and given, corresponded in all respects with the facts contained in the affidavit aforesaid. The affidavit states, that the plaintiff *falsely* and *fraudulently* represented to the defendants, that &c. The jury have found that there was no probable cause for

the accusation of fraud. There is, therefore, no ground for saying, that the statement to counsel was fairly made, or that it was in good faith acted upon.

The judgment and order denying the motion for a new trial, must, therefore, be affirmed with costs.

N. Y. SUPERIOR COURT.

THE BOSTON SILK AND WOOLEN MILLS, appellants agt. GEORGE EULL, Survivor, &c., respondent.

Counter-claims, under the Code since 1852, embrace both *set-offs* and *recoupments* as they were understood prior to that time.

Therefore, a defendant now may not only defeat a plaintiff's claim by recoupment, if his demand is sufficient, but may recover a balance, notwithstanding the former rule, to the effect that in cases of recoupment, as opposed to a set off, a defendant could only use his claim to *defeat* that of the plaintiff.

Costs are to be allowed, of course, to the plaintiff, upon a recovery in the actions of which a court of justice of the peace has no jurisdiction, *regardless of the amount of the recovery.*

Consequently, where the plaintiffs claim and the defendants counter-claim *on the* trial, amounted to over $700, and the plaintiffs recovered $13.72, they were entitled to costs against the defendant.

The *district courts in the city of New York* are not courts of justices' of the peace within the meaning of the Code.

General Term, May, 1869.

THIS is an appeal from an order made at special term reversing the decision of the clerk of this court to the effect that the defendant is not entitled to the costs of this action, declaring the defendant entitled to such costs and directing the clerk to adjust them.

WEEKS and FORSTER, *attorneys for plaintiffs and appellants.*

MERCHANT and ELLIOTT, *attorneys for defendants and respondents.*

By the court, FREEDMAN, J. The appeal involves the question, which party is entitled to the costs of the action. The complaint is for goods sold and delivered between the 4th day of November and the 30th day of December, 1867. The answer "by way of set-off or counter-claim" sets up an agreement as to quality and to the further effect that all

goods thereafter delivered, but not coming up to said quality might be returned, and that credit should be allowed to the defendant therefor; that dealings took place between the plaintiffs and defendant during the years 1865, 1866 and 1867, upon the basis of said agreement; that considerable portions of the goods so delivered under said agreement did not come up to the stipulated quality and were returned and received back, and credit allowed therefor to the defendant; that among the goods thus purchased were ninety-eight gross of tape, amounting to the sum of three hundred and ninety-two dollars, which were not of the quality stipulated for, but were, as soon as discovered, returned on or about December 18, 1867, which sum the defendant claimed as a set-off or counter-claim against any sum which the plaintiffs might recover for the goods stated in the complaint.

The plaintiffs, in their reply, deny specifically each and every allegation in the answer, referring to the counter-claim therein set up.

It appears sufficiently, from the allegations of the answer, that the ninety-eight gross of tape returned as aforesaid did not constitute any portion of the goods for the recovery of the price of which this action is brought. But whatever doubt might be indulged in upon a superficial perusal of the answer alone, is dispelled by the testimony of the defendant himself, who, upon his examination testified that the ninety-eight gross were among a number of deliveries received from about June to October or November, 1867, that they had been settled for by note, which became due on the 24th day of December, 1867, and was paid at maturity.

The affidavits of George H. Francis and George H. Forster, submitted on the hearing at the special term, also prove distinctly that the ninety-eight gross of tape formed no part of the goods for which the suit was brought. There can, therefore, be no doubt that the defendant's claim of three hundred and ninety-two dollars constituted a counter-

claim within the meaning of section 150 of the Code (*Lignot* agt. *Redding*, 4 *E. D. Smith*, 285; *Halsey* agt. *Carter*, 1 *Duer*, 667; *Welch* agt. *Hazleton*, 14 *How.*, 97; *Gillespie* agt. *Torrance*, 25 *N.Y.*, 306).

Counter-claims, under the Code since 1852, embrace both set-offs and recoupments as they were understood prior to that time (*Pattison* agt. *Richards*, 22 *Barb.*, 146).

A set-off is a money demand by the defendant against the plaintiff, and refers to a debt or demand independent of and unconnected with the plaintiffs' cause of action. It may exceed the plaintiffs' claim or fall short of it.

Recoupment, however, always implies that the plaintiff had a cause of action; the doctrine of recoupment was generally confined to damages for non-performance of the very contract sued upon (*Seymour* agt. *Davis*, 2 *Sandf.*, 239, *and Deming* agt. *Kemp*, 4 *Sandf.*, 149), and a balance could not be certified in favor of a defendant before the Code (*Sickels* agt. *Pattison*, 14 *Wend.*, 257). Since the Code, however, of 1852, it seems that if the defendant's demand is sufficient, a defendant may not only defeat a plaintiffs' claim by recoupment, but recover a balance, notwithstanding the former rule, to the effect, that in cases of recoupment, as opposed to set-off, a defendant could only use his claim, to defeat that of the plaintiff (*Ogden* agt. *Coddington*, 2 *E. D. Smith*, 317).

But while the counter-claim authorized by the Code embraces both set-off and recoupment, it is broader and more comprehensive than either (*Vassar* agt. *Livingston*, 3 *Kern.*, 256; *Beardsley* agt. *Stover*, 7 *How.*, 294). It secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill would have secured him on the same state of facts (*Gleason* agt. *Moen*, 2 *Duer.*, 642). It may be for either liquidated or unliquidated damages (*Schubart* agt. *Harteau*, 34 *Barb.*, 447), and for unliquidated damages arising on a contract different from the contract on which the action is brought (*Lignot* agt. *Redding*, 4 *E. D.*

Smith, 285), and of an equitable or legal nature (*Currie* agt. *Cowles*, 6 *Bosw.*, 453).

The plaintiffs in this action sued to recover the price of specific quantities of goods sold and delivered within a certain specified period of time.

The counter-claim of the defendant consisted of a money demand against the plaintiffs wholly independent of and unconnected with the plaintiffs' cause of action, namely, of a claim for the value of other goods, which had been returned, although settled for, and taken back by the plaintiffs, and which had nothing whatever to do with the goods for which plaintiffs sued. This claim therefore, did not, properly speaking, go in reduction of plaintiffs' claim; the defendant could not recoup it, but it constituted a set-off within the definitions hereinbefore laid down, for which the defendant might have brought a separate action against the plaintiffs, for the right of the plaintiffs to claim and of the defendant to counter-claim was reciprocal, as has been established by the verdict of the jury.

The jury found in favor of the plaintiffs for the full amount of their claim, four hundred and five dollars and seventy-two cents, and in favor of the defendant for the full amount of the defendant's set-off, three hundred and ninety-two dollars, and after deducting the same from the amount due to the plaintiffs, rendered a verdict for the differenee, to wit: thirteen dollars and seventy-two cents in favor of the plaintiffs.

The total amount of the accounts and demands of both parties proved on the trial consequently was, seven hundred and ninety-seven dollars and seventy-two cents.

Subdivision 3 of section 304 of the Code provides that costs shall be allowed, of course, to the plaintiff, upon a recovery in the actions of which a court of justice of the peace has no jurisdiction, regardless of the amount of the recovery (*Stilwell* agt. *Staples*, 5 *Duer.*, 691); and subdivision 4 of section 54 of the Code says that no justice of the peace

shall have cognizance of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars. In construing these sections of the Code together, the right of the plaintiffs to recover the costs of the action seems not only clear, but appears to be fully established by the decisions in *Stilwell* agt. *Staples*, (5 *Duer.*, 691); *Crim* agt. *Cronkhite*, (15 *How.*, 250), *Gilliland* agt. *Campbell* (18 *How.*, 177), and see *Glackin* agt. *Zeller*, (52 *Barb.*, 147).

The defendant insists, however, that this is otherwise since the passage of chapter 344 of laws of 1857 (*vol.* 1 *page* 708), entitled "An act to reduce the several acts relating to the district courts in the city of New York into one act," and claims that as under the third section of said act jurisdiction has been conferred upon said district courts in actions similar to those as provided by sections 53 and 54 of the Code, where the sum recovered shall not exceed two hundred and fifty dollars, *notwithstanding the accounts of both parties may exceed four hundred dollars*, the district courts of the city of New York had jurisdiction of this action, and that for that reason and the further reason that they are courts of the justices of the peace within the meaning of that phrase in the Code, he is entitled to costs. It is true that by the language of the said third section the jurisdiction of the district courts is to be ascertained, not as has been the case before, by the amount claimed, but by *"the sum recovered."* It seems the plaintiffs may claim any amount, and if he does not recover more than two hundred and fifty dollars, the court has jurisdiction; but the plaintiffs can in no case recover more than two hundred and fifty dollars.

Section 49 of the same act provides, however, that where the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue. Assuming, therefore, that the district courts of the city of New York had jurisdiction to try the issues between

the parties to this action, the question of costs is to be determined by construing together section 303, subdivision 4 of sections 304 and 305 of the Code; and in such case neither party is entitled to costs against the other, under the decision in *Kalt* agt. *Lignot*, (3 *Abb.*, 190; *affirming same case, reported in* 3 *Abb.*, 33, *and* 12 *How.*, 535). The decision in the case of *Crane* agt. *Holcomb*, (2 *Hilt.*, 269), relied on by the defendant as establishing a contrary doctrine, will be found, on close examination, not to be in conflict with the last cited case, for the reason that the answer in *Crane* agt. *Holcomb*, in which case the plaintiff sued as indorser and holder of a promissory note made by the defendant, did not set up an independent demand againt the *plaintiff*, for which the defendant might have maintained a separate action against the *plaintiff*, but an equitable defense against the greater part of the plaintiff's claim, namely, a counter-claim against the payee, while he was holder of the note, and then alleged further that the note came to plaintiff's possession after maturity, and subject to defendant's claim against it. The case was therefore correctly decided, notwithstanding the decision seems to have been placed upon different grounds.

But the question still to be determined, is whether the district courts of the city of New York are courts of justices of the peace within the meaning of that phrase in the Code. The defendant has not been able to cite a case in which this point has been decided. *Crane* agt. *Holcomb*, (*supra*), is no authority on this point; and in *Maguire* agt. *Gallagher* (2 *Sandf.*, 402), the court expressly declined to base its decision upon this theory. The district courts referred to, were *created* in 1813 (2 *R. L.*, *p.* 370, *section* 85), and were known until the year 1848, under the style of "assistant justices' courts of the city of New York." By chapter 153 of the laws of 1848 (*p.* 249), they were reorganized, and designated as "justices' courts of the city of New York." During the same session their name or style was changed to "assistant

justices' courts of the city of New York." (*Laws* 1848, *p.* 404); and the Code of the same year refers to these courts by the same style (*Laws* 1848, *p.* 509). In 1849, the style of said courts was again changed to that of "justices' courts in the city of New York," and in 1852, to "district courts in the city of New York" (*Laws* 1852, *chap.* 324, *p.* 471). By the act of 1857, hereinbefore referred to, the last-named style was retained, and the said courts have been known by that name ever since. It will be found, however, upon an examination of the various statutes of this state passed since 1813, and which are too numerous to be mentioned in detail, that during the whole period of their existence under the aforesaid various names these courts have enjoyed and maintained before and since the Code, and at all other times, a jurisdiction entirely distinct from that of the courts of justices of the peace; they were organized in a different manner; they were regulated by special enactments, and treated as a distinct class of city courts of a jurisdiction inferior to that of courts of record, but greater than that possessed by courts of justices of the peace; provisions of law applicable to the latter were held applicable to the district courts only so far as they were made so by statute; and the Code itself has maintained to the present day a marked and wide distinction between proceedings in, appeals from, and regulations appertaining to said district courts and courts of justices of the peace. The history of legislation upon this subject is therefore adverse to the claim set up by the defendant; and in *Mills* agt. *Winslow*, (2 *E. D. Smith*, 18), the general term of the court of common pleas expressly decided in broad terms that the said district courts and the marine court of the city of New York are not courts of justices of the peace within the meaning of the Code. The cases of *Jackson* agt. *Whedon*, (1 *E. D. Smith*, 141), and *Davis* agt. *Hudson*, (5 *Abb.*, 64), tend to establish the same doctrine.

Another important reason why the construction contended for bv the defendant cannot be sanctioned,is, that no statute should be so construed as to work injustice. If the plaintiffs had commenced their action for the recovery of the sum of four hundred and five dollars and seventy-two cents claimed by them in the district court, and the defendant had failed to appear, the plaintiffs could have taken judgment only for two hundred and fifty dollars. Their claim would have become merged in the judgment, but the judgment would not have constituted a bar to the claim of three hundred and ninty-two dollars of the defendant, and the defendant could have collected his entire claim in a separate action instituted for that purpose in a court of record.

The order appealed from should be reversed, with ten dollars costs, and the decision of the clerk affirmed.

BARBOUR, Ch. J.—I concur.

FITHIAN, J.—I concur.

N. Y. SUPERIOR COURT.

SAMUEL L. GRAHAM, respondent agt. ROBERT L. MAITLAND, survivor, &c., appellant.

Where a *commission merchant* has, under his instructions, a *reasonable time* thereafter, within which to negotiate and effect a sale of the goods consigned, at the best possible market price, the measure of damages, to be recovered against him is the *market value of the goods during that period of time.* And such value the plaintiff is bound to establish affirmatively, by competent evidence as a part of his case.

No case can be found, where proof of a *single sale*, has been held sufficient evidence to establish the market value of the article so sold.

General Term, March, 1869.

APPEAL from a judgment entered on report of a referee.

EDGAR S. VAN WINKLE, *counsel for plaintiff.*
HENRY A. CRAM, *counsel for defendant.*

By the court, FREEDMAN, J. The referee found that the plaintiff, on the 11th day of October, 1865, instructed the defendant to sell fifty bales of cotton, consigned to and received by the defendant since the 6th day of September, 1865. The plaintiff's testimony shows that the said instruction was given by the plaintiff in a letter to the defendant, dated Pinewood, Tenn., October 7, 1865, as follows:

"I wish all this cotton sold, but insist that it should be held at the full price of middling cotton. If it will not command this price, after holding it on the market for a sufficient length of time, you will take what it will command &c., &c.," and that the plaintiff, in another letter dated from the same place, October 11, 1865, addressed the defendant as follows: "I trust you will get me a good price for this cotton; at all events, if it is not sold when this reaches you, I wish it sold at the best price it will command, &c., &c."

The defendant, therefore, was not instructed to sell without loss of a moment's time upon the very day of the receipt of the order, but had a reasonable time thereafter within which to negotiate and effect a sale at the best possible market price, and the measure of damages consequently is the market value of the cotton during that period of time. Such value the plaintiff was bound to establish affirmatively by competent evidence as a part of his case. There is no evidence that the forty-nine bales of cotton previously sold in violation of prior instructions to hold the same, until expressly instructed to sell, were of the quality or grade denominated middling, and could be sold as such; on the contrary, the defendant showed that the said bales were of an inferior quality, termed low middling. It appears, however, that on the 21st day of October, 1865, the defendant sold for plaintiff's account four other bales of cotton, which were middlings, at fifty-eight cents per pound, and that sometimes the difference in price between middling and low middling ranged from one cent to two and a half cents per pound, according to the scarcity of the one grade or the greater quantity of the other, and from these facts alone the referee found that the market value of the forty-nine bales on the 11th day of October, 1865, was fifty-six cents per pound. There is also evidence to the effect that in consequence of advices from England the cotton market in the month of October, 1865, became very agitated and unsettled. The important question therefore arises whether upon the facts as alleged the finding of the referee in regard to said market value can be sustained. To ascertain the same, required an investigation of the actual condition of the market on the 11th day of October, 1865, and for such a short time thereafter as the defendant might have claimed as being necessary for the purpose of negotiating and effecting a sale at the best possible price. The law, in regulating the measure of damages and fixing the market value in a case of this description, contemplates a range of the entire market and the

average of prices as thus found, running through a reasonable period of time (*Smith* agt. *Griffith*, 3 *Hill*, 333).

The ordinary and proper mode of ascertaining such value is by the examination of witnesses acquainted with the market prices of the article during that time. The actual sales of the same article during said time in the market generally might, in this case, have furnished a proper standard of such value; and, in the absence of any other means to fix said value, the plaintiff might have even resorted to the opinion of witnesses dealing in the same article as formed from their general knowledge of the business (*Dana* agt. *Fiedler*, 1 *E. D. Smith*, 463; *same case*, 12 *N. Y.*, 40).

But no case can be found in the books in which proof of a single sale has been held sufficient evidence to establish the market value of the article so sold; and the difficulty in the present case is further increased by the fact that the four bales of cotton sold on the 21st day of October, 1865, were not even of the same quality.

The evidence is insufficient to sustain the finding of the referee upon this point, and the judgment entered in pursuance of said report; and the judgment, therefore, should be set aside, and a new trial ordered, with costs to abide the event, and the order of reference should be vacated.

Under these circumstances it is unnecessary to consider the other points raised by the defendant.

SUPREME COURT.

MARGARET BARRY, administratrix, agt. JOHN GALVIN and LAWRENCE GALVIN.

A party *examines an adverse party*, under §§ 390, 391 and 392 of the Code, at his peril; and whatever evidence is taken, whether before or at the trial, without objection, is competent, and may be used notwithstanding the restriction of § 399.

Sixth District, Binghamton, General Term, November, 1867.
Before MASON, BOARDMAN *and* BALCOM, *Justices.*

THIS was an action upon a promissory note, signed by defendants, the signature of Lawrence being by a mark, and was tried at the June circuit for Cortland county in 1866.

The defendants answered separately; John admitting the execution of the note, and setting up a counter-claim and Lawrence denying his execution of the note, and setting up counter-claims. After issue was joined, the defendant, John, was examined as a witness at the instance of the plaintiff under § 391 of the Code, and testified among other things in answer to plaintiff's inquiry that he executed the note for himself; that he signed his brother Lawrence's name and under his mark to said note, that Lawrence had no knowledge of such act, and had given him no authority to make such signature, and had never sanctioned, authorized, or ratified it. Upon the trial the plaintiff rested without having read John's testimony so taken. The defendants then offered John's testimony in evidence, which was rejected upon objection by plaintiff, and defendant excepted.

The defendant then offered such part thereof as was drawn out only by plaintiff's counsel, to which plaintiff objected as incompetent under § 399 of Code.

The court admitted such portion thereof only as does not relate to transactions had personally between John Galvin

and the intestate; to which defendant excepted. Lawrence was afterwards called as a witness, on his own behalf, to prove that he did not sign said note, or authorize John to sign it, which evidence, upon objection by the plaintiff, was rejected, and defendant excepted. The plaintiff obtained a verdict for the amount of the note and interest; proceedings thereon were stayed, and the case and exceptions were ordered heard in the first instance at the general term. Some other questions were raised upon the trial, which need not be noticed.

BALLARD & WARREN, *for defendants.*

Cited *Green* agt. *Wood* (15 *How.*, 341, 344), *Suydam* agt. *Suydam* (11 *id.*, 518), *Plato* agt. *Kelley* (16 *Abb.*, 188), *Watson* agt. *Gage* (12 *id.*, 215), *Franklin* agt. *Pinkney* (18 *id.*, 186: 41 *Barb.*, 635) *and Code*, § 392.

A. P. SMITH, *for plaintiff.*

Cited *Dubois* agt. *Baker* (40 *Barb.*, 556, 562), *and Code*, 399.

By the court. BOARDMAN, J. Prior to the act of 1847 (2 *Laws of* 1847, 630), the only mode of securing an adverse party's evidence was in equity by bill for discovery.

Upon such bill being filed, and answer put in making the required discovery, the defendant was entitled to use such answer in his own behalf, if the plaintiff refused to offer it as adverse to his case. There are certain exceptions to the right of the defendant to use such answer, but subject to such exceptions the right of the defendant to use his own evidence given in answer to such bill of discovery was absolute. (3*d. Green. Ev.*, §§ 284, 289, 290; *Holt* agt. *Ten Eyck*, 2*d. J. ch.*, 89, *etc.*)

The act of 1847 without abolishing the bill of discovery provided for the examination of an adverse party, on commission, conditionally or upon the trial. To guard against the possible wrong which might result from the examination of an adverse party, and a refusal on a new or second trial to again examine such adverse party, because such examination was unfavorable to the party calling him, it is provided by § 5 that in case of such refusal, such adverse party may offer himself as a witness in his own behalf.

Then came the provisions of the Code, substantially as they now stand (*Code*, § 389 *to* 395), by which the action to obtain discovery was abolished, and the mode therein prescribed substituted. It will be recollected that parties could not then offer themselves as witnesses as now authorized by § 399. By the Code, then, as well as now (§ 392), such examination may be read by either party on the trial; and the commissioners, in submitting the Code to the legislature, remarked of this clause, as follows:

"When a party has called his adversary to be sworn as a witness, the testimony ought to be deemed evidence in the case, in the same manner as the deposition of any other witness, and if the examining party will not use it, the party examined should be permitted to do so." (*Rep. of Com's*, 1848, *note to ch.* 6 *of title* 12.)

It is thus apparent that the law has always designed to protect a party against the artifice of an adversary, who, if possible, would indulge these fishing expeditions with the option to use or reject the spoils as *his* interest might dictate. When parties were made competent as witnesses in their own behalf in 1857, the provision for examining an adverse party became of much less consequence, and have since been but little used. But when a party is sworn in his own behalf, he has been greatly restricted in the nature of the evidence he may give if his adversary objects. If no objection is made or *a fortiori* if the adversary examine a party

upon subjects which he would be permitted to testify to, in his own behalf, it is not error and its evidence is competent.

Now in this case the plaintiff examines the defendant John, and draws out from him a mass of evidence which John would not have been permitted to have sworn to in his own behalf, and then finding the evidence hostile to the cause of action, plaintiff refuses to use it himself, or to allow the defendant to use it. In this I think the plaintiff is wrong, and the following cases confirm the views I have taken of the question. *Gellatty, receiver, &c.*, agt. *Lowery*, (6 *Bosw.*, 113); *Conkle* agt. *Underwood*, (3 *Duer.*, 670, 679); *Plato* agt. *Kelly*, (16 *Abb.*, 188); *Watson* agt. *Gage*, (12 *id.*, 215); *Suydam* agt. *Suydam*, (11 *How.*, 518); *Green* agt. *Wood*, (15 *id.*, 388, 344); *Partin* agt. *Schackstone*, (2*d Code R.*, 66 *cited in Voorh. Code 4th ed. note to* § 390).

These authorities warrant the views I have taken, though by no means are they conclusive, since the force and effect of § 399 upon an examination taken under § 392 is not considered or even brought in question.

It follows from what has been said that a party examines an adverse party under §§ 390, 391 and 392 at his peril,and whatever evidence is taken, whether before or at the trial without objection, is competent and may be used notwithstanding the restriction of § 399. But upon the other question of allowing the defendant to testify that he did not sign the note, I think there was no error. It would allow the proof of a negative which should determine the whole issue in a manner impossible perhaps if the intestate were living.

Such a practice would violate the letter and spirit of § 399, as thoroughly as for a defendant to swear he had never received any money of the deceased, if the acts could establish by evidence that he had. (*Clark* agt. *Smith*, 46 *Barb.*, 30.) The case of *Franklin* agt. *Pinkney*, (18 *Abb.*, 86) is quite distinct. There the plaintiff was allowed to ove by himself that he had deposited money to the credit

of defendants intestate, such intestate not being present or knowning thereof. It was held that this was not a personal transaction between them within § 399. While this decision is not necessarily in conflict with my views, it seems difficult to reconcile it with the case of *Dubois, administrator* agt. *Baker*, (40 *Barb.*, 550, 552, *affd.* 30 *N. Y.*, 355) in which the defendant to relieve himself from the suspicions of wrong in presenting a note of $5,000 against the estate represented by plaintiff, the body of which note was in ink of one color, and the signature of intestate in another, offered to prove that he usually carried an inkstand with him. It was rejected as showing a fact as a personal transaction between deceased and defendant. But for the reason first assigned I think the verdict should be set aside and a new trial granted, costs to abide the event.

N. Y. SUPERIOR COURT.

JAMES SPEYERS, agt. EDWARD LAMBERT.

In 1863, the legislature (*Sess. L.* 1863, *Ch.* 464, § 2) amended the *statute of frauds*, so that that section reads as follows: "In the following cases, every agreement shall be void unless such agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith.

1. Every agreement that by its terms is not to be performed within one year from the making thereof.
2. Every special promise to answer for the debt, default or miscarriage of another person.
3. Every agreement, promise or undertaking, made upon consideration of marriage, except a mutual promise to marry.

The former statute of which the above is an amendment, had the words, "expressing the consideration," after the words, memorandum thereof, in said second section.

Held, that the legislature thus changed the statute, with the express intention that the requirement, that the *consideration be expressed* in every agreement should thereafter no longer be insisted on *in any manner*.

Held also, that in the face of this legislative intent sufficiently expressed, the judicial interpretation of the law, as applied in some cases to the law of 1813, in conformity with the English doctrine must cease, as inconsistent therewith and totally repugnant thereto.

Consequently, an agreement as follows: "J. S. Esqr. The house you have rented to A. B. M., I agree to hold myself responsible for the payment of the monthly rent—say 400 per month. Yours respectfully, E. L."

Held valid, although it might not be considered binding as an original undertaking.

General Term, May, 1869.

Before BARBOUR, *Ch.* J., FREEDMAN *and* FITHIAN, *JJ.*

THIS case come before the courts upon the application of the plaintiff for judgment upon the verdict of $1,683,33 directed upon the trial of this action in favor of the plaintiff, subject to the opinion of the court at general term.

DAVID MCADAM, *attorney for plaintiff.*
HINSDALE and PATTERSON, *attorneys for defendant.*

By the court, FREEDMAN, J. The action is brought against the defendant as surety for one Mrs. Marshall, a tenant of

the plaintiff. The evidence shows clearly, that before renting the premises, the plaintiff required security for the rent; Mrs. Marshall proposed the name of the defendant, a lease was drawn up, which bears date April 6, 1867, and which, it must be assumed, as the evidence stands, was signed and executed by her on that day; the plaintiff, however, before executing it on his part, called upon the defendant in relation to the security, and the defendant thereupon, in the presence of the plaintiff, wrote and executed an agreement in writing and delivered the same to the plaintiff, as follows:

"NEW YORK, April 11, 1867.

"JAS. SPEYERS, Esq.:

"*Dear Sir*—The house you have rented to Mrs. A. B. Marshall, I agree herewith to hold myself responsible for the payment of the monthly rent, say $400 per month.

"Yours respectfully,

"EDWARD LAMBERT."

After the receipt of this instrument the plaintiff signed the lease and directed the same to be delivered to Mrs. Marshall, and on the first of May following Mrs. Marshal went into occupation of the premises under said lease. The defendant paid the first month's rent, and when the agreement was first made he stated to the plaintiff that he had the rent for six months in his hands. The rent sued for, accrued during the first six months of the tenant's term, to wit: from June 1, 1867, to October 1, 1867, for which amount, together with interest, the learned justice presiding at the trial directed a verdict for the plaintiff, subject to the opinion of the court at general term.

The defendant insists, however, that judgment should be ordered for him as in case of non-suit, because the instrument sued upon is void by the statute of frauds, for the reason that it does not express upon its face a consideration. He claims that this is necessary, notwithstanding this requirement does no longer exist in express terms since the

passage of chapter 464 of the laws of 1863; that the statute, as it was framed by the revisers and adopted by the legislature (3 *R. S., part* 1, *chap.* 7, *title* 1, *section* 2, *subd.* 2), was itself an amendment of the so-called statute of frauds of 1813 (2 *Rev. Laws* 1813, *chap.* 3, *p.* 78, *but properly the act of* 1787), which was identical with the statute as it stands since the amendment of 1863; that therefore the amendment of 1863 merely re-established the rule of law as it existed before the Revised Statutes; that section 11 of the act of 1813 was literally the same as section 4 of the original statute of 29 Car., 2, chap. 3, from which our law was taken; that therefore the statutes of 1863 and 1813, and the English statute, being with reference to this point, in all respects similar, must be construed together; that the principles of interpretation, which were at any time applied to one of these acts, attach to the others, and that inasmuch as it was settled law under the English statute and under section 11 of the act of 1813, now substantially revived, that in order to sustain an action upon an agreement, of guaranty of the debt, &c., of another, the consideration must appear in the writing, for the reason that the consideration is a necessary and integral part of the agreement, without which a valid contract cannot be made, the same rule applies to the instrument forming the basis of this action.

The defendant therefore wholly rests his case upon the assumption that such was the settled law prior to 1830 in the absence of all statutory requirements to this effect. The first case in which this proposition was laid down was *Wain* agt. *Warlters* (5 *East*, 10), decided in the Queen's Bench, in 1804, in which the defendant had promished in writing to pay the debt of another person, *which was past due.* Although the decision of this case was several times disapproved by Lord ELDON, and particularly in *Gardom* (15 *Ves.*, 286), it was never overruled, and afterwards the same point being directly presented to the judges of the Queen's

Bench it was unanimously affirmed in *Saunders* agt. *Wakefield* (4 *Barn. and Ald.*, 595), and from that time the doctrine of *Wain* agt. *Warlters* appears to have been admitted as, beyond question, the English law upon this point. In the United States the same question has occasioned a more marked conflict of judicial opinion than any other arising under the statute of frauds. Of those states where the word "agreement" is retained in the clause requiring the memorandum, the doctrine of *Wain* agt. *Warlters* is repudiated in Maine (*Levy* agt. *Merrill*, 4 *Greenl.*, 189; *Gilligan* agt. *Boardman*, 29 *Maine* [16 *Shep.*, 81]; *Vermont* (*Smith* agt. *Ide*, 3 *Verm. R.*, 299; *Patchin* agt. *Swift*, 21 *id.*, 297); *Connecticut* (*Sage* agt. *Wilcox*, 6 *Conn. R.*, 81); *Massachusetts* (*Packard* agt. *Richardson*, 17 *Mass. R.*, 122, *and to remove all uncertainty the Revised Statutes of Massachusetts have since expressly provided that the consideration need not appear*); *New Jersey* (*Buckley* agt. *Beardslee*, 2 *South.*, 572); *North Carolina* (*Miller* agt. *Irvine*, 1 *Dev. and Bat.*, 103; *Ashford* agt. *Robinson*, 8 *Ired.*, 114), *Ohio* (*Reed* agt. *Evans*, 17 *Ohio R.*, 128); *and Missouri* (*Bean* agt. *Valle*, 20 *Mo. R.*, 103; *Halsa* agt. *Halsa*, 8 *id.*, 305); but it has received the sanction of the courts of New Hampshire, Georgia, Michigan and Wisconsin. In Maryland the question does not seem to have been finally disposed of (*see Brooks* agt. *Dent*, 1 *Md. Ch. Dec.*, 530); in South Carolina, in which the English doctrine had been approved (*in Stephens* agt. *Winn*, 2 *Nott and McC.*, 372, *note a*), it was afterwards treated as an open question (*in Lecat* agt. *Tavel*, 3 *McCord*, 158), and in Indiana the tendency of the courts to adopt the English doctrine was checked by the legislature by the incorporation of a provision into the present Revised Statutes to the effect that the consideration may be proved by parol. In Louisiana the civil law prevails, and by that law no consideration is necessary to be stated (*Ringgold* agt. *Newkirk*, 3 *Ark.*, 97).

In the state of New York the question also gave rise to a variety of opinions, and with all due respect to the expres-

sions of learned and distinguished judges, to the effect that the English doctrine became the law of this state, I cannot subscribe to this broad statement.

The construction given in *Wain* agt. *Warlters*, to the term "agreement," in the English statute, was adopted by the supreme court of the state of New, in 1808, in *Sears* agt. *Brink*, (3 *Johns. R.*, 210), and followed in *Kerr* agt. *Shaw*, (13 *Johns.*, 236), decided in 1816. In *Livingston* agt. *Tremper*, (4 *Johns.*, 416), the decision in *Sears* agt. *Brink*, was qualified so as not to include contracts under seal, upon the ground that the statute of frauds was not meant to alter the common law rule in regard to such contracts, that at common law any promise under seal was valid, and that a seal imports a consideration. In *Leonard* agt. *Vredenburgh*, (8 *Johns.*, 23), the supreme court awarded a new trial, upon the ground that the testimony offered on the trial as to the consideration was rejected, for the reason that the consideration for the promise was not stated in the writing produced. KENT, Ch. J., in delivering the opinion of the court, says: "the case appeared to me then to be governed by the decision in *Wain* agt. *Warlters*, which was recognized by this court in *Sears* agt. *Brink*; but, upon better reflection, I now think that the plaintiff ought to have recovered upon that contract."

In *Bailey* agt. *Freeman*, (11 *Johns.*, 223), PLATT, J., in delivering the opinion of the court, approved of the decision in *Leonard* agt. *Vredenburgh*, (*supra*), and held that where the credit is originally given to the defendant as surety, it is unnecessary to show a separate consideration for the promise of the defendant; that where the principal contract and the guaranty were simultaneous, the consideration of the former supports the latter, that the consideration may be shown by parol proof in such case, and intimated that the doctrine laid down in *Wain* agt. *Warlters*, should be confined to promises to pay an independent *previously existing* debt of

another person, and should not be extended to original collateral agreements.

The case of *Nelson* agt. *Dubois*, (13 *Johns.*, 175), is to the same effect. The opinion of the court was delivered by justice SPENCER, while justice VAN NESS, who had delivered the opinion of the court in *Sears* agt. *Brink*, (*supra*), dissented.

In *Rogers* agt. *Kneeland*, (10 *Wend.*, 251, 252), justice NELSON, in delivering the opinion of the court, not finding it necessary to disapprove of *Sears* agt. *Brink*, and assuming it to have been followed in other cases, which I have shown has not been the fact, held that the consideration may be implied or inferred upon the general principle applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument is in judgment of law contained in it. This decision was subsequently affirmed by the court of errors in 1834 (13 *Wend.*, 114), where it was held, however, that the object of the statute was to reach every case of mere suretyship, whether the agreement of the surety was collateral, to a *previous promise* or liability on the part of the principal debtor, or only collateral to a *promise* or *agreement made at the same time* with the promise of the surety to indemnify against a future default or liability of such principal debtor, and that where the whole credit is not given to the person who comes in to answer for another, the promise is collateral. The chancellor, in this opinion, regretted that the courts had felt themselves bound to give a construction to the statute, by which it was made, in many cases, to operate as a fraud on those who have acted upon the faith of a written promise of a third person, but which, unfortunately, had no sufficient consideration actually appearing upon the face of the writing; and in noticing the amendment of the statute, by the revision of 1830, the chancellor intimated that it was a question whether the legislature has not gone still further in the Revised Statutes, and inadvertently adopted provis-

ions which will include agreements *under seal*, as well as those which are not, contrary to the decision of the supreme court in *Livingston* agt. *Tremper*, (*supra*).

But even in England, it was subsequently to the decision in *Wain* agt. *Warlters*, held not to be necessary that the consideration should be formally and precisely expressed in the memorandum, but that the same might be implied or inferred from the language of the instrument. This led to the remark of TINDALL, Ch. J., "That if by fair inference we can find that, that is sufficient—if we can, as it were, *spell it out* from the agreement." This practice seems to have been adopted in this state to some extent in disposing of cases presenting no features by which they could be distinguished from *Wain* agt. *Warlters*; but it was disapproved by the revisers and the legislature, who thought that it was improper for the courts to find out the consideration of an agreement by inferring or implying or spelling out the consideration, or by making it out by argument or conjecture; and it was enacted by the legislature in the adoption of the Revised Statutes, that the agreement should *express* the consideration. This remained the law of the state for over thirty years, but the question what cases did or did not come within this requirement, and the question as to the sufficiency of the expression of the consideration in each individual case, gave rise to much additional litigation, and produced a still greater conflict of opinion than had previously existed, and the legislature in 1863 saw fit to again strike out the provision of the statute which required that the consideration should be expressed in the instrument. The defendant therefore insists that this amounts to a restoration of the act of 1813, and that the restoration carries with it all the results of the judicial interpretation put upon that act. If this be correct, we are at liberty to spell out the consideration from the defendant's agreement, and I think it could be done (*see Dunning* agt. *Roberts*, 35 *Barb.*, 463). But I do not think it necessarily follows that,

because the legislature, in 1863, made the law read, as it once read in 1813, that a judicial interpretation then applied without any statutory authority, should be again put in force in spite of a legislative declaration to the contrary. The case of *Ely* agt. *Holton*, (15 *N. Y.*, 598), does not go to this extent. The effect of the amendment of 1863 must be construed agreeably to the intention of the legislature which enacted it; to hold that the legislature, in striking from the statute the requirement that the consideration must be expressed in the agreement mentioned in the statute, nevertheless intended to enact that the courts might still continue to enact and enforce this requirement, involves a palpable absurdity, and no construction or interpretation should ever be put upon any expression of the legislative will which leads to such a result.

On the contrary, it is fair to assume, that in view of the fact that many of the states had repudiated the doctrine of *Wain* agt. *Warlters* from the start; that in others, where it had been followed to some extent, it was either considerably modified by the courts, and in the course of time restricted to a small class of cases, or entirely abrogated by statute; that even the courts of England found themselves compelled to modify and refine it by degrees; that after an attempt and trial for more than thirty years to enforce it in this state by express statutory enactment, it was found to do more harm than good inasmuch as it operated as a fraud on the merchant, the farmer, the mechanic and the laborer, who acted upon the faith of the written promise of a third person, but who in most cases found it very difficult to state the real consideration of the collateral promise in legal and technical form, so as to make a valid agreement; that therefore, in this age of great and rapid commercial progress the further requirement of a compliance with a technical rule of law not prescribed by nor observed in other states, the enforcement of which had proved an endless source of trouble, annoyance and injustice, without yielding in a correspond-

ing degree the benefits expected to flow from it, namely, the prevention of crime of perjury, was inconsistent with the true commercial interests of the great state of New York, with its rapidly increasing population, composed in part of valuable foreign elements. It is fair to assume, I repeat, that in view of all these considerations, the legislature changed the statute in 1863, with the express intention that the requirement, that the consideration be expressed in every agreement, should thereafter no longer be insisted on in any manner, I can arrive at no other conclusion; and whoever will undertake the task of reading and studying among other cases the decisions in *Brewster* agt. *Silence*, (4 *Selden*, 207), followed in *Glen Cove Ins. Co.* agt. *Harrold*, (20 *Barb.*, 298), and in *Draper* agt. *Snow*, (20 *N.Y.*, 331), and on the other hand the case of the *Union Bank* agt. *Coster's executors*, (3 *Comst.*, 203), the controlling principle of which decision was necessarily involved and reaffirmed and approved in *Gates* agt. *McKee* (3 *Kern.*, 232), and again in *Church* agt. *Brown*, (21 *N.Y.*, 315), and then notice the frank admission of chief justice COMSTOCK, in the last-named case, that the decision of the case of *Brewster* agt. *Silence*, which he had followed, with his associates, in *Draper* agt. *Snow*, (20 *N.Y.*, 331), was erroneous, and thereafter he should be prepared to uphold the contracts and dealings of men belonging to the class which are condemned in the decision referred to: whoever, I say, will undertake that task, will, in all probability, arrive at the same conclusion to which I have arrived, as regards the reasons which induced the legislature, among other things, to change the statute in 1863. It is true, the legislature might have been more explicit, and enacted, in the words of the Massachusetts statute, that "That the consideration of any such promise, contract or agreement, need not be set forth or expressed in the writing, signed by the party to be charged therewith, but may be proved by any other legal evidence," or the words of the Indiana statute, which is nearly similar to that of Massachussetts; but, al-

though this has not been done, I think the legislature of this state has been sufficiently explicit, under all the circumstances, in making known its determination to enact the same rule. In the face of this legislative intent sufficiently expressed, the judicial interpretation of the law, as applied in some cases to the law of 1813, in conformity with the English doctrine, must cease, as inconsistent therewith and totally repugnant thereto.

I have no doubt that since 1863, securities to an immense amount have been taken in business throughout this state, in reliance upon the idea that a compliance with the old rule is no longer necessary; the interpretation contended for by the defendant would place all the contracts entered into in respect to these securities in jeopardy, and would thus greatly increase the uncertainty of the law, which is now proverbial.

In conclusion I refer to the case of *Thompson* agt. *Blanchard*, (3 *Comst.*, 337), in which it was held, by the court of appeals, that an undertaking required by statute to be entered into by sureties, in order to give a right of appeal, is valid if it contain the necessary stipulations, although it does not express a consideration, and is not under seal; and that if it could be said that such an instrument would not be obligatory by the statute of frauds, the very obvious answer is, that the legislature of 1848 had the same power to restore the common law, as to this class of securities, that their predecessors had to abolish it.

It may be a question whether, under the peculiar circumstances of this case, the defendant is not liable upon his agreement as an original undertaking, but under the views already expressed it is unnecessary to discuss this point.

Judgment absolute should be ordered for the plaintiff on the verdict, with costs.

BARBOUR, Ch. J.—I concur.

FITHIAN, J.—I concur.

SUPREME COURT.

LAWRENCE L. BROWN, respondent, agt. JAMES EATON, appellant.

Where a *summons* contains a notice under the *first* subdivision of § 129 of the Code, and is served *before* the complaint; and the complaint sets out a cause of action under the *second* subdivision of that section, it is such an irregularity as to require the court to *set aside the complaint*, on motion of the defendant; and it is pretty well settled that such an irregularity is not cured or waived by a *general appearance* in the action.

But it has been doubted whether the same rule will be applied when the notice in the summons is under the *second* subdivision, and the cause of action in the complaint authorizes judgment without such application under the *first* subdivision of § 129. (*See Henson* agt. *Decker*, 29 *How.*, 385.)

Where the summons and complaint *are served at the same time*, no motion to set aside either, ought to prevail, on the ground, merely, that the summons contains a notice under the *second* subdivision of § 129, and the complaint states a cause of action under the *first* subdivision; for the reason that in such case the complaint alone furnishes the cause or ground of action, and is the only foundation upon which the action can proceed.

Fifth District, Onondaga, General Term, April, 1869.

Before BACON, FOSTER, MULLIN *and* MORGAN, *Justices.*

APPEAL from an order of the special term denying motion to set aside the complaint. *The summons and complaint were served together.* The defendant after giving notice of appearance, moved to set aside the complaint because of variance. The summons contained the notice specified in the second subdivision of § 129 of the Code, and the complaint set out a cause of action upon contract for the recovery of money only, and contained a notice that judgment would be taken for a sum certain.

R. O. JONES, *for appellant.*
GEO. C. CARTER, *for respondent.*

By the court. MORGAN, J. When the summons is served *before* the complaint, and contains a notice under the *first*

subdivision of § 129, and the complaint sets out a cause of action under the *second* subdivision, it is held by several authorities to be such an irregularity as to require the court to set aside the complaint on motion of the defendant; and it seems to be pretty well established that such an irregularity is not cured or waived by a general appearance in the action. It has been doubted however whether the same rule will be applied when the notice in the summons is under the second subdivision, and the cause of action in the complaint authorizes judgment without such application, under the first subdivision of § 129. (*Hemson* agt. *Decker*, 29 *How. Rep.*, 385.)

The distinction is supposed to be governed by the rules formerly applied to the case of a declaration varying from the cause of action stated in the *ac etiam* clause of the *capias*. If, however, we are to be governed by the decisions under the old system of pleading, it is very clear that the irregularity cannot be taken advantage of by the defendant on motion either to set aside the summons or complaint.

The *ac etiam* (like the summons under § 129) was intended briefly to express the cause of action, without which the defendant could not be held to bail (2 *R. S.*, 348). When the defendant was held to bail on *capias* by an *ac etiam* the plaintiff was bound to pursue it and declare accordingly, or the court on motion would set aside the declaration, and order an *exoneretur* on the bail piece. (*Rogers* agt. *Rogers*, 4 *John. R.*, 485; *Durfee* agt. *Heimstreet*, 1 *W. R.*, 305.)

But in no case could the defendant take advantage of a variance in this respect, except in cases where he had been arrested and held to bail (*McFarland* agt. *Townsend*, 17 *W. R.*, 442). We cannot therefore rely upon the old practice to sustain this motion.

The decisions cited by the counsel are mostly the individual views of judges at special term, and are by no means uniform or consistent with each other. If the defendant may be prejudiced by the supposed irregularity, I see no

reason why he may not appear and move to set aside the complaint. If he cannot be prejudiced by it, there is no reason why he should be heard at all.

It is evident that the defendant cannot be misled by the form of notice in the summons, *when the summons and complaint are served together.* The form of the notice in the summons confers no right upon the plaintiff to enter judgment without an application to the court, when such application is necessary by the form of the complaint (*Cobb* agt. *Dunkin*, 19 *How. R.*, 164); and when it is regular to take judgment without such application, it is not irregular to apply for and obtain an order for judgment. The most that can be said is that it is unnecessary to apply for judgment in such a case. The defendant is in no way prejudiced by it. I do not concur in the doctrine laid down by the judge in *Tuttle* agt. *Smith* (14 *How. P.*, 395; 6 *Abb.*, 320), and think it ought not to be followed.

But when the summons *precedes* the complaint the defendant may be misled to his prejudice. If the summons states truly the nature of the claim, the defendant may not be put to the trouble and expense of an appearance. Especially is this so when the summons gives notice of an application to the court for the *relief demanded* in the complaint, and the case is one where, if the true sum was mentioned, the defendant would understand from the summons that he had no defense to the claim. So far therefore as the decisions sustain the right of the defendant to move to set aside the complaint, when it is served *subsequently* to the summons and varies from it, I am of opinion that we should follow them; but as the Code expressly authorizes the summons and complaint to be *served together*, I do not think the defendant can rightfully claim that he can appear and say he has been prejudiced, because in *contemplation of law* the summons *precedes* the complaint. The principal object of the summons is to bring the defendant into court. If the defendant should appear without service of the summons

it may be dispensed with altogether (*Code*, § 139). After the defendant has appeared, there is an end of the process. It has become *functus officio*. All subsequent proceedings are based upon the complaint, and when they are served together, as they may be under the Code, it is a mere fiction to suppose that the summons precedes the complaint. It is however very questionable whether it can be supported as a fiction, for by the very terms of the notice in the summons the plaintiff refers to the complaint. In the case at bar the notice is that the plaintiff will apply to the court for the relief demanded in the complaint.

This according to the requirements of § 129 of the Code and doubtless the notice thus provided for in subdivision 2 of that section, contemplates that the complaint has already been drawn up.

But without attempting to criticize the decisions which maintain such a *fiction* or to deny that it may have some truth to support it, it is quite too harmless to justify the defendant in resorting to a motion, for the purpose of annoying the plaintiff and subjecting him to costs.

If the correction of the supposed *irregularity* or *variance*, could be of any benefit to the defendant, or if he had been misled by it to his prejudice, there would be some ground for sustaining a motion to set aside the complaint.

In my opinion, no such motion ought to prevail, where the summons and complaint *are served at the same time*, for the reason that in such a case, the complaint alone, furnishes the cause or ground of action, and is the only foundation upon which the action can proceed. All the subsequent proceedings and pleadings are goverened by the form of the action as stated in the complaint; and in no way by the form of notice contained in the summons. To allow the defendant to overlook the complaint and resort to the summons for the cause of action, for no purpose except to make a dilatory and fruitless motion, is to encourage a practice

which has already become very troublesome to parties, and very annoying to the courts.

One of the most difficult questions to deal with, is the *form* of notice to be inserted in the summons. The judges do not agree as to the *form* of notice in some cases, and it is very little consequence in a majority of cases which form is adopted. Why, increase the difficulty by favoring motions to set aside either the summons or complaint, except in case where it is apparent that the defendant has been or may have been misled to his prejudice by the form of the summons.

It may be well enough to look into the question, when the summons is *in fact served before the complaint.* But when they are *served together*, the variance is not of sufficient importance in any aspect of the case, to justify the court in spending their time upon motions to set aside either the summons or complaint. And this agrees with the former practice of the court, in regard to motions to set aside the complaint when it differed from the *ac etiam* clause of the *capias.*

If the defendant was prejudiced by it, that is, if he had been arrested and held to bail, the court set aside the complaint, otherwise not. The question to be determined is, whether the variance is prejudicial to the defendant, if it is, the practice is to set aside the complaint, otherwise not.

As the defendant was not and could not be prejudiced by the supposed variance in the case at bar, I am in favor of affirming the order of the special term, with $10 costs of the motion.

All the judges concurring, ordered accordingly.

N. Y. SUPERIOR COURT.

CHARLES P. CURRIE and others, appellants agt. CUMBERLAND G. WHITE, respondent.

The plaintiffs and the defendant being *stockbrokers* in the city of New York, on the 18th day of February, 1867, entered into an agreement for the sale and purchase of stocks, as follows:

"NEW YORK, 18th Feb'y, 1867.

(1000 shares.) We have purchased of C. G. White, one thousand (1000) shares of the capital stock of the Hudson R. R., at one hundred and twenty-eight per cent, payable and deliverable seller's option, in this year (1867) with interest at the rate of six per cent per annum; either party having the right to call from time to time, for deposits, to meet the fluctuations of the market" (Signed) Currie, Martin, & Co.

A counter-part of this agreement, for the sale to Currie, Martin & Co., of 1000 shares of said stock, was signed by C. G. White.

Held, that this is an *executory contract*. The obligation of the vendor to deliver, and that of the buyers to pay, are concurrent conditions in the nature of mutual conditions precedent, and neither party can enforce the contract against the other without showing performance, or offer to perform his own promise according to the conditions of the contract; and as the vendor had the option to deliver at any time, according to his pleasure, between the day of the contract and the 31st day of December, 1867, and the buyers could not be called upon to pay before delivery, it *cannot be considered as an executed contract of sale*.

Consequently, any *cash dividends* declared upon said shares of stock during such period, or any *additional shares* of stock which may be issued by the company during such period, which may enure to the benefit of the stockholders of the company, either by dividends or otherwise, upon such additional shares, or any difference in the price of the shares of such original stock, between the *contract price and their market value*, during such period, all enure entirely to the benefit of the *owner* of the stock—the seller named in the contract, and not to the purchasers therein—the contract remaining executory.

General Term, March, 1869.

APPEAL from judgment at special term.

This action, upon the issues of fact joined therein, was tried before the Hon. SAMUEL JONES, justice, at special term, without a jury.

The nature of the action, and the facts, will fully appear from the findings of fact and conclusions of law of said justice, which are as follows:

I. That the plaintiffs are copartners under the firm name of Currie, Martin & Co., and the plaintiffs and the defendant were, at the times hereinafter mentioned, stockbrokers.

II. On the eighteenth day of February, 1867, the plaintiffs and the defendant entered into an agreement with each other, and executed as evidence thereof, the following written instruments.

EXHIBIT A.

(1000 shares.) New York, 18th Feb'y, 1867.

We have purchased, of C. G. White, one thousand (1000) shares of the capital stock of the Hudson River R. R., at one hundred and twenty-eight per cent., payable and deliverable sellers option, in this year (1867), *with interest* at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits, to meet the fluctuations of the market."

[10 cent stamp.] CURRIE, MARTIN & CO.

EXHIBIT B.

(1000 shares.) New York, Feb'y 18, 1867.

I have sold to Currie, Martin & Co., one thousand shares of the capital stock of the Hudson River railroad company, at one hundred and twenty-eight per cent., payable and deliverable seller's option in this year, with interest at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits, to meet the fluctuations of the market. C. G. WHITE.

[10 cent stamp.]

III. Under the said agreement, the plaintiffs made six deposits as security for the performance thereof, in the United States Trust company, as follows:

On the	23d February,	1867, the sum of	$10,000
"	13th May,	" "	10,000
"	20th May,	" "	5,000
"	8th June,	" "	10,000
"	19th July,	" "	10,000
"	22d July,	" "	10,000

and called upon the defendant to make six like deposits, which he did.

The Trust company gave to the plaintiffs, for each deposit made by them, a certificate in the following form:

EXHIBIT C.

United States Trust Company of New York, }
($10,000) 23d February, 1867. }

This is to certify, that Currie, Martin & Co., have deposited with this company ten thousand dollars, payable in current funds on five days notice, to them and C. G. White jointly, upon the surrender of this certificate (which is assignable only upon the books of the company), with interest commencing after ten days from date, at the rate of four per cent. per annum. No interest to be allowed unless the same amounts to at least fifty cents.

JOHN A. STEWART, *President.*

W. DARROW, Jr., *Secretary.*

These certificates were all alike, except as to dates and amounts, which were made to correspond with the deposit for which the particular certificate was given.

The Trust company also gave to the defendant, for each deposit made by him, a certificate in the following form:

EXHIBIT D.

United States Trust Company of New York, }
($10,000.) February, 23, 1867. }

This is to certify that C. G. White has deposited with this company ten thousand dollars, payable in current funds on five days' notice, to him and Currie, Martin & Co. jointly, upon the surrender of this certificate (which is assignable only upon the books of the company), with interest, commencing after ten days from date, at the rate of four per cent. per annum. No interest to be allowed unless the same amounts to at leat fifty cents.

JOHN A. STEWART, *President.*

W. DARROW, Jr., *Secretary.*

These certificates were all alike, except as to dates and amounts, which were made to correspond with the deposit for which the particular certificate was given.

To so much of this finding as found, that the deposits therein mentioned were made as security for the performance of the contract between plaintiffs and defendant, the plaintiffs afterwards, by exception duly filed, excepted, on the ground that such alleged fact was not proven.

IV. On the 15th day of April, 1867, the Hudson River railroad company declared a cash dividend of four dollars per share upon the capital stock of said company, as it stood on the 18th day of February, 1867, and on the 15th day of October, 1867, declared another cash dividend of four dollars per share upon the same amount of capital stock.

The plaintiffs, on the trial, requested the court to find:

That the cash dividend last-mentioned was also declared on that portion of the additional stock which was issued on the 15th of April, 1867.

The court refused so to find, on the ground that such alleged fact was immaterial, to which the plaintiffs duly excepted, on the ground that the matter of fact, embraced in the finding so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence.

The said court further found:

V. The said dividends were paid to the holders of said stock, on said 18th day of February, and on the 15th day of October, 1867, respectively.

The plaintiffs, on the trial, requested the court to find:

That the cash dividends, on that portion of the additional stock which was issued at $54 per share, was paid to the holders of said stock, on the 15th day of October, 1867.

The court refused so to find, on the ground that such alleged fact was immaterial; to which the plaintiffs duly excepted, on the ground that the matter of fact, embraced

in the finding so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence.

The said court further found:

VI. On the first day of April, 1867, the board of directors of the said The Hudson River railroad company passed the following preamble and resolutions:

EXHIBIT E.

Office of The Hudson River Railroad Co.,
270 West 30th Street,
New York, April 1, 1867.

To the Stockholders of the Hudson River Railroad Co.:

Take notice, that the board of directors of this company, at their meeting, held this day, passed the following preamble and resolutions:

Whereas, the stockholders of the company at a meeting of such stockholders, called by the directors of the company, in the manner required by law, and held at the office of the company, on the 30th day of March last, did with the concurrence of more than two-thirds in amount of all its stockholders, authorize and sanction the increase of the capital stock of the company, to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars; therefore,

Resolved, That the capital stock of the company be, and the same, is hereby increased to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars.

Resolved, That the stock transfer books of this company, be closed on the tenth day of April, instant, and that the persons or parties in whose names stock shall be standing on that day shall severally, on or before the 15th day of April, instant, be entitled to subscribe at the office of the company, No. 270 West thirtieth street, in the city of New York, for an equal amount of additional stock; that the price of the additional stock shall be fifty dollars per share, payable as follows:

Fifteen dollars per share at the time of subscribing.
Five dollars per share on the 15th day of May next.
Five dollars per share on the 15th day of June next.
Five dollars per share on the 15th day of July next.
Five dollars per share on the 15th day of August next.
Five dollars per share on the 16th day of September next.
Ten dollars per share on the 15th day of October next.

That on the 15th day of October next, all instalments being paid, full paid stock shall be issued.

Resolved, that where parties desire, for their own convenience, to anticipate payments, their money for any number instalments will be received, but no interest will in any case be allowed; nor will the stock be issued until the 15th day of October next.

Resolved, That stockholders failing to subscribe on or before the 15th day of April, instant, or neglecting to pay their several instalments as they severally become due, will lose all right to the additional stock, and will be deemed to have abandoned their subscriptions.

Resolved, That the subscriptions may be made to the additional stock, either in person or by attornev. A scrip receipt will be given for the payments made, and this receipt must be presented at this office on the payment of any of the subsequent instalments, in order to have them entered upon it, and be surrendered to be canceled on the issue of the additional stock.

Resolved, That where parties desire to receive full stock on the 15th day of April, instant, they may do so by paying fifty-four dollars per share at the time of making their subscriptions.

By order of the board. C. C. CKARKE, *Treasurer.*

The books of the company were opened for subscriptions to the additional stock, under regulations established by the above resolutions of the board of directors.

The plaintiffs, on the trial, made separate requests to the court to find the following facts, respectively.

1. That in the month of April, 1867, the said Hudson River railroad company increased their capital stock by doubling it.

2. That before said increase, the said capital stock was $6,968,700, and, by such increase, became $13,937,400.

3. That there was a meeting of the stockholders of the said company held for the purpose of increasing the capital stock, as aforesaid, on the 30th day of March, 1867, on the day advertised in the notice thereof, which was given on the 5th of March, 1867.

4. That, at said meeting, there was duly represented a very large majority of the stock.

5. That the notice above mentioned, exhibit "E," was published at its date, and came to the knowledge of the defendant.

6. That the stockholders subscribed, in the books of the company, for the whole of the additional stock; that a part of them, as prescribed in said exhibit "E," subscribed at the rate of $54 a share, and a part of them at the rate of $50 a share.

7. That the books of subscription, to such increased stock, were opened from 10th of April, 1867, to 24th October, 1867.

8. That the bulk of the stockholders subscribed before the 15th of April, 1867, and that the last subscriptions were made on the 24th October, 1867.

9. That the new stock was duly issued under these subscriptions, and according to the terms of the notice, exhibit "E."

10. That the persons who so subscribed, were persons who were stockholders on the books of the company on the 10th April, 1867, or their legal representatives, and no others.

11. That each of them received of the new stock the same number of shares that he then held of the old stock.

As to each and every of the foregoing eleven requests, the court refused, separately, to find in accordance there-

with, on the ground that such alleged facts were each of them immaterial, and the first three unproved.

And, to each of such separate refusals, the plaintiffs duly and separately excepted, on the ground that the matter of fact embraced in the finding, so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence.

The said court further found:

VII. On the 8th day of April, 1867, the plaintiffs sent to the defendant a notice, of which the following is a copy:

EXHIBIT F.

New York, April 8, 1867.

C. G. WHITE, Esq.:

Dear Sir—On the 18th February last, we purchased from you one thousand shares of Hudson River railroad company stock, at one hundred and twenty-eight per cent., seller's option, this year.

You will please take notice, that we elect to subscribe for the additional stock as provided in the resolutions of the company, at their meeting on the 1st April, instant, and that we look to you for the same. Very respectfully,

CURRIE, MARTIN & CO.

VIII. But the said notice was not received, by the defendant, until between four and five o'clock in the afternoon of the 10th day of April, 1867.

IX. That if there was any tender or offer to perform the contract, on their part, made by the plaintiffs to the defendant, said tender or offer was made either on the 19th day of December, 1867, or on the 31st day of December, 1867, and at no other time or times.

X. That there was no tender or offer to perform the contract, on his part, made by the defendant to the plaintiffs. That the defendant did not, either on the 19th or the 31st day of December, 1867, or at any time, deliver to the plaintiffs either the one thousand shares mentioned in the aforesaid contract, or one thousand alleged additional shares,

or any part thereof; nor did the defendant pay to plaintiffs, either on the 19th or 31st day of December, 1867, any dividend which had been declared by the Hudson River Railroad Company, or any part thereof.

XI. That at the time of the entering into the contract aforesaid, the plaintiffs did not pay the purchase-money mentioned in said contract, or any part thereof; nor have they, at any time since entering into the contract aforesaid, paid the purchase-money therein mentioned, or any part thereof, to the defendant.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted, on the ground that the deposits mentioned in the third finding were payments of portions of the purchase-money

The plaintiffs, on the trial, made separate requests to the court to find the following facts, respectively:

1. That on the 19th day of December, 1867, the plaintiffs offered to accept from the defendant the one thousand shares of Hudson River Railroad stock, in said contract mentioned.

2. And also offered to pay for the same, to the defendant, the sum stated in said bill, Exhibit "H," $134,421.33, and duly tendered such payment.

3. That the defendant refused to accept such offer, or tender.

4. That the said defendant also refused to deliver the said shares.

5. That, at the same time, the plaintiffs demanded of the defendant the dividends on the one thousand shares above mentioned.

6. That, at the same time, the plaintiffs demanded of the defendant the delivery to them of a second one thousand shares of said stock, the portion of the new issue of stock by the said company, on their increase of capital in April, 1867, accruing to the owner and the holder of the one thousand shares above mentioned, with the cash dividends

made thereon; and that the plaintiffs then offered to pay the defendant the price at which the said stock was issued, with interest $56,232, and duly tendered such payment.

7. That the defendant refused to accept such tender.

8. That the defendant refused to deliver said second 1,000 shares.

9. That the defendant refused to pay or account for the said dividends, or either of them.

10. That on the 18th day of December, 1867, the defendant sent to the plaintiffs a notice, of which the following is a copy:

EXHIBIT G.

New York, Dec. 18, 1867.

Messrs. CURRIE, MARTIN & Co.:

I will deliver you, to-morrow, 1000 shares Hudson R. R. stock on my contract, Feb. 18, seller this year, at $128 per share. Respectfully, C. G. WHITE.

11. That on the 19th December, 1867, the defendant pursuant to his notice, went to the plaintiffs' office, having with him 1,000 shares of said stock, and a bill properly stamped, of which the following is a copy:

EXHIBIT H.

CURRIE, MARTIN & Co., *To* C. G. WHITE,

February 18,	1,000 Hudson, $128,	$128,000.00
	10 mo. and 1 day int., 6 p. c.	6,421.33
U. S. Stamp. $13.44.	Certified check.	$134,421.33

12. That the said defendant saw Mr. Martin, one of the plaintiffs, standing behind the counter. He handed Mr. Martin the bill, the copy of which is given above, Mr. Martin asked him if he would not take off the cash dividends; he replied that he would if Mr. Martin would indorse his certificates in the Trust Company.

13. That Mr. Martin, one of the plaintiffs, then handed to the defendant two papers, copies of which are as follows:

EXHIBIT I.

New York, Dec. 19, 1867.

Mr. C. G. WHITE:

We will accept the 1,000 shares Hudson R. R. stock, you propose to deliver us to-day, and pay you therefor the sum stated in your account, $134,421.33, and we demand of you the cash dividends thereon, and interest. Respectfully.

CURRIE, MARTIN & CO.

EXHIBIT K.

New York, Dec. 19, 1867.

Mr. C. G. WHITE:

We require you to deliver to us, under your contract, dated 18th February, 1867, a second 1,000 shares of Hudson R. R. stock, the portion of the new issue of stock by said company, on their increase of capital in April, 1867, accruing to the owner and holder of the 1,000 shares mentioned in your said contract. We tender to you the price at which said new stock was issued, with interest, $56,232, and demand and claim from you the delivery of said second 1,000 shares and the cash dividends, if any, that have been made thereon. Yours, CURRIE, MARTIN & CO.

14. That the defendant then stepped to the window, read the two papers, and remarked to Mr. Martin that he did not know the effect of the two papers, but would consult his attorney and return. He then left, taking with him the stock.

15. That the defendant did not return.

16. That the defendant did not, at that interview, produce or exhibit the certificates, nor tell the plaintiffs that he had them.

17. That Mr. Martin, one of the plaintiffs, at the last-mentioned interview, drew the plaintiffs' check for $134,421.33.

18. And also, that said Martin, at the same time, drew the plaintiffs' check for $56,232.

19. That the said checks were ready to be delivered to the defendant before he so left plaintiffs' office.

20. That the plaintiffs handed these checks, as soon as they were drawn, to their clerk to go and get them certified.

21. That the president of the bank, on which such checks were drawn, had previously agreed to certify them.

22. That the plaintiffs had not drawn the checks, before defendant came to their office, on the said 19th day of December, because they did not know precisely how much defendant wanted them to pay, or whether defendant would deduct the cash dividends.

23. That it was the usage and custom of said business, in delivering stock, for the purchaser to receive the bill, and draw the check immediately, send it to the bank and get it certified, and for the seller to wait to receive it.

24. That the defendant did not ask for the checks, or either of them.

25. That the checks were not tendered at the time to defendant, merely because defendant went away, saying he would return. And that he did not return.

26. That on the 31st day of December, 1867, the plaintiffs offered to accept from the defendant the 1,000 shares of Hudson River railroad stock in said contract mentioned.

27. And also offered to pay for the same to the defendant the sum stated in said bill, Exhibit H, $134,421.33, and duly tendered such payment.

28. That the defendant refused to accept such offer or tender.

29. That the said defendant also refused to deliver the said shares.

30. That, at the same time, the plaintiffs demanded of the defendant the dividends on the 1,000 shares above mentioned. That, at the time, the plaintiffs demanded of the defendant the delivery to them of a second 1,000 shares of said stock, the portion of the new issue of stock by the said company, on their increase of capital in April, 1867, accruing to the owner and holder of the 1,000 shares, first above mentioned, with the cash dividends made thereon; and that the plain-

tiffs then offered to pay to the defendant the price at which the said stocks were issued, with interest, $56,232, and duly tendered such payment.

31. That the defendant refused to accept such tender.

32. That the defendant refused to deliver said second 1,000 shares.

33. That the defendant refused to pay or account for the said dividends, or either of them.

34. That on 31st December, 1867, at about half-past one o'clock, the plaintiffs sent by their messenger to defendant, a letter as follows:

EXHIBIT L.

Mr. C. G. WHITE:

Sir—Our checks for $134,421.33 and $56,232 have been ready for you since they were tendered you, with our two notices relative to our Hudson River contract, on the 19th inst.; you then said you were not ready to give an answer, but would see about it.

We are ready to do what we offered and tendered in our notices, and renew our notices, but suppose your silence is equivalent to your refusal to comply with them.

Yours, &c., CURRIE, MARTIN & CO.

N. Y., December 31, 1867.

And two checks, one for $134,421.33, the other for $56,232.

35. That these checks were the same that were drawn on the said 19th December.

36. That the plaintiffs had since kept the said checks in their possession.

37. That when the plaintiffs' messenger went to the defendant's office, on the 31st December, he tendered him these two checks with the letter (exhibit L.)

38. That said messenger handed the letter to the defendant and said: "here are the checks."

39. That the defendant took and looked at the checks.

40. That said defendant then said in reply, "I will see," and paid no further attention to the matter.

41. That the said messenger then observed to the defendant, that he would get the checks certified if he required it.

As to each and every of the foregoing forty-one requests, the court refused separately to find in accordance therewith, on the ground that such alleged facts were, each of them, immaterial; and on the ground that no tender by plaintiffs was proved; and, on the further ground that there was no offer to take and pay for the one thousand shares, distinct and independant of a demand for another one thousand shares; and for two dividends on two thousand shares; and the further ground that the requests from 10th to the 25th, both inclusive, and from the 24th to the 31st, both inclusive, are requests to find to matters of evidence only.

And, to each of such separate refusals, the plaintiffs duly and separately excepted, on the ground that the matter of fact embraced in the finding, so proposed to said court, was proven on said trial by unimpeached and uncontradicted evidence; and, on the further ground, that the objection that there was no offer to take and pay for the one thousand shares, distinct and independent of a demand for another thousand shares, and for two dividends on two thousand shares, was not taken or stated by the defendant at the trial; nor in any way brought to the plaintiffs' notice before the decision in this action.

The said court further found:

XII. That on the said 19th day of December, 1867, the market value of the capital stock of the said Hudson River Railroad Company was $132\frac{7}{8}$ per share. On the 31st day of December, 1867, the market value thereof was $131\frac{5}{8}$ per share; and on the 8th day of February, 1868, after which day the trial of this action was had, the market value thereof was $149 per share.

The said court found the following

CONCLUSIONS OF LAW.

1. That the plaintiffs are not entitled to recover from the

defendant the said dividends declared on the said one thousand shares of stock mentioned in the contract.

To this finding and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

II. That the plaintiffs are not entitled to recover from the defendant the difference between the market value of one thousand of the alleged additional shares, on the 8th day of February, 1868, and the sum required by the said The Hudson River Railroad Company, to be paid for such alleged additional shares.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

III. That the plaintiffs are not entitled to recover the difference between the market value of the one thousand shares, mentioned in the said contract, on the 8th day of February, 1868, and the contract price, to wit, one hundred and twenty-eight dollars, per share.

To this finding, and the whole thereof, plaintiffs afterwards, by exceptions duly filed, excepted.

IV. That the defendant is not entitled to recover from the plaintiffs the difference between the contract price of the one thousand shares, mentioned in the contract, and the market value of said shares on the 19th day of December, 1867.

V. That the defendant is entitled to judgment, dismissing the plaintiffs' complaint, and directing the plaintiffs to duly indorse the said six certificates of deposit issued to the defendant by the said The United States Trust Company; and further directing the defendant to indorse the six certificates issued to the plaintiffs by the said The United States Trust Company, so that the plaintiffs and the defendant may draw out the said deposits by them respectively made with said Trust Company as aforesaid, with the interest that has accrued or may accrue thereon, before such withdrawal.

VI. That the defendant recover nothing from the plaintiffs on his counter-claim.

VII. That neither party have the costs of the action as against the other.

The plaintiffs, on the trial, separately requested the court to find each of the following conclusions of law:

First. That the plaintiffs are entitled to judgment against the defendant, for the market value of the first mentioned one thousand shares, after deducting $128 per share, the contract price, with the interest thereon from the date of contract, at the rate of six per cent. per annum.

The court refused so to find, to which the plaintiffs duly excepted.

Second. That the plaintiffs are entitled to judgment against the defendant, for $8,000 dividends on said one thousand shares.

The court refused so to find, to which the plaintiffs duly excepted.

Third. That the plaintiffs are entitled to judgment against the defendant for the value of one thousand shares, being of such new issue, at their market value, less the price at which the same was so issued.

The court refused so to find, to which the plaintiffs duly excepted.

Fourth. That the plaintiffs are entitled to judgment against the defendant, for $4,000 the dividend made and paid on said second one thousand shares, being of such new issue.

The court refused so to find, to which the plaintiffs duly excepted.

The following opinion was rendered by the same justice:

JONES, J.—(After reciting the facts and setting forth exhibits A. to L. inclusive.) The plaintiffs claim:

1st. The dividends declared on the 1,000 shares and interest. 2d. The difference between the value of 1,000 of the alleged additional shares on February 8, 1868, and the sum required by the company to be paid therefor, and interest. 3d. The difference between the value of the 1,000

shares (mentioned in the contract) on the 8th of February, 1868, and the contract price and interest.

The defendant contests all these claims, and himself claims the difference between the contract price of the 1,000 shares mentioned in the contract, and their marketable value on December 19, 1867, with interest thereon.

As to the plaintiffs claims:

The first two evidently depend on whether the contract was executed or executory; that is, whether it operated as an actual and present sale, or only as an agreement to sell, to be carried into effect on a future day.

Dividends declared and additional shares issued, when declared and issued, become the property of those who own the stock in respect whereof they are declared and issued at the time of said issue and declaration. They are not incorporated in, nor do they become a part of that stock in respect whereof they are issued, but are mere profits arising therefrom to the then owners thereof.

One, by making a contract whereby he agrees to sell, a year after its date, property real or personal, does not thereby deprive himself of any profit, which may have accrued therefrom, or advantage which may arise from its possession or use during that year; nor do such profits or advantages pass to the purchaser in the absence of an express contract that they shall pass.

If, then, the contract in question is executory, and remained unexecuted until after the dividends were declared and the additional stock was issued, the plaintiffs are not entitled to them.

It is often a matter of great difficulty to determine whether a contract is executed or executory; but, in this case, whatever doubts I may have had are set at rest by the case of *Kelly* agt. *Upton*, decided by the general term of this court (5 *Duer.*, 336), which is a direct authority in point, and according to which the contract in question is executory.

Nothing was attempted to be done to execute it until December 19, 1867, long after the dividends were declared and the additional stock issued.

It results that the first two claims of plaintiffs must be disallowed.

The third claim is founded on an erroneous application of the rule relative to the measure of damages.

This defendant, if liable at all, is so for the simple breach of a contract to deliver certain stock, the vendee not having paid to him the purchase money in advance. In such case the measure of damage is the difference between the contract price of the articles agreed to be sold and their market price on the day of breach.

This difference the plaintiffs would be entitled to recover. It therefore becomes necessary to ascertain whether the defendant broke his contract. If so, when, and the market value of the stock on the day of the breach.

If there has been any breach by defendant it occurred either on the 19th or 31st of December, 1867. As the market value of the stock on one of those days was less than the contract price, plaintiffs, even if there was a breach by defendant, suffered no actual damage. It is therefore unecessary in this view to consider whether there was such breach.

As to the defendant's claim. This rests on the defendant's allegation that there was a breach of the contract on the plaintiffs' part on the 19th of December. To establish such breach, he insists that he, on that day, tendered, and was ready and offered to deliver the stock, but plaintiffs neglected to receive it and pay for it. Assuming that his handing up exhibit 11, the stock being in his possession, was a sufficient tender, and a sufficient indication to plaintiffs of his readiness and ability then and there to fulfil his contract, yet the effect of it was done away by his subsequent acts at the same interviews; for, after plaintiffs handed him exhibits I and K, he clearly withdrew his previous tender,

and declared himself not ready then to fulfil his contract, by saying that he desired time to consult his lawyer, and would return shortly, and thereupon departed with the stock in his possession.

The result arrived at is, that neither party has a claim against the other for damages arising out of a breach of the contract in question, and that each party is entitled to a return of the deposit made by him, with the interest thereon.

The case is one in which each party should pay his own costs.

Judgment was, on the 24th day of October, 1868, entered in conformity with the findings and opinion of said justice, and from so much of the judgment as directs the plaintiffs to indorse the six certificates of deposit issued to the defendant, and to do other things in respect thereto, and as adjudges that the plaintiffs recover nothing from the defendant, the plaintiffs appeal to the general term.

WILLIAM R. MARTIN, *plaintiffs' attorney.*
BARRETT & BRINSMADE, *defendant's attorneys.*

By the court, FREEDMAN, J. The plaintiffs claim that they are entitled to recover against the defendant:

I. The $8,000 cash dividends declared upon the first 1,000 shares mentioned and referred to in the contract of February 18, 1867, with interest.

II. The value of 1,000 additional shares of an alleged later issue, at the price of 149, that being the alleged market value of the same on February 8, 1868, less the price of 54, at which they were issued by the company, with interest, &c.

III. A cash dividend of $4,000, claimed to have been made upon the 1,000 additional shares of the later issue; and,

IV. The value of the first 1,000 shares of Hudson River Railroad stock, mentioned in the contract of February 18, 1867, at the price of 149, that being the alleged market-

value of the same on the 8th day of February, 1868, after deducting therefrom the contract price of 128, with interest at the rate of six per cent. added thereto, from the date of the contract.

Upon a mere inspection of the contract, it does not appear whether the defendant had or had not at the time the possession of the 1,000 shares therein referred to; and the first question which presents itself is as to the effect of the said contract. Does it constitute an actual bargain and sale, whereby the 1,000 shares, the subject of the said contract, became the property of the plaintiffs the moment the contract was concluded, and without regard to the fact that the defendant had the option to deliver the shares at any time during the year he saw fit; or, is it a mere executory agreement, an agreement to sell, to be carried into effect at some time during the course of that year according to the pleasure of the defendant?

There is no doubt—to use the language of Judge COMSTOCK in *Decker* agt. *Furniss* (4 *Kern.*, 612)—that the phrases "we have purchased" and "I have sold" standing at the head of the contract import an executed sale, but such phrases are quite inconclusive and are often made to yield to other terms of the contract evincing a different design, and they are qualified in this case by the words: "payable and deliverable, sellers' option, in this year (1867), with interest at the rate of six per cent. per annum; either party having the right to call, from time to time, for deposits to meet the fluctuations of the market."

The defendants' engagement to deliver was not unconditional, but dependent upon the exercise of his option; he had a right to perform that part of the contract at any time between the date thereof and the 31st day of December, 1867; he was in no way chargeable for the non-delivery until after the expiration of the last-named day, and a tender on the part of the plaintiffs after that day; and before the exercise of the option by the defendant, neither of the par-

ties could be in default before said 31st day of December, 1867, (*Russell* agt. *Nicoll*, 3 *Wend.*, 112; *Outwater* agt. *Dodge*, 7 *Cow.*, 85; *Ward* agt. *Shaw*, 7 *Wend.*, 405; *McDonald* agt. *Hewitt*, 15 *Johns. R.*, 349).

The obligation of the vendor in this case to deliver, and that of the buyers to pay, are concurrent conditions in the nature of mutual conditions precedent, and neither party can enforce the contract against the other without showing performance, or offer to perform his own promise according to the conditions of the contract; and, as the vendor had the option to deliver at any time, according to his pleasure, between the day of the contract and the 31st day of December, 1867, and the buyers could not be called upon to pay before delivery, it cannot be considered as an executed contract of sale.

It is true, that in some cases, notwithstanding the postponement of payment and delivery, it has been held that the right of property became vested in the vendee, while the right of possession continued in the vendor until the payment of the purchase money; but these cases have reference only to the sale of specific personal property, and if the plaintiffs intend to claim title to the 1,000 shares upon the principles decided by these cases, they should have have shown either that the identical 1,000 shares were, at the time of the execution of the contract, in the possession of the defendant, or some other specified place; that they were defined and designated so as to be capable of being identified and distinguished from other shares of the same company, and that the contract referred to this particular lot.

It does not appear from the contract that reference was had or made to any specific or particular lot of shares, nor does the evidence show that such was the intention of the parties, and therefore the general rule applies, that if goods be sold while mingled with others, by number or otherwise, the sale is incomplete, and the title continues with the seller

until the bargained property be separated or identified (2 *Kent, Com.*, 496). The reason is, in such case, that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. Thus if an entire flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that object is specification, the property is not changed—but if it is merely to ascertain the total value at designated rates, the change of title is effected. Thus where there is a bargain for a certain quanity, ex. a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to the property does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable until that is done. If I agree to deliver a certain quantity of oil, as 10 out of 18 tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided (*Gillett* agt. *Hill*, 2 *C. & M.*, 530).

The case of *Kimberly* agt. *Patchin*, (19 *N. Y.*, 330), does not establish a contrary doctrine, as claimed by plaintiffs, but on examination it will be seen that it is in perfect harmony with the general rule referred to by me. In this case parties clearly expressed their intention that the title should pass. The owner of the wheat, lying in mass in his warehouse, sold 6,000 bushels thereof for a specified price, executed to the vendee a receipt, acknowledging himself to hold the wheat subject to the purchaser's order, received drafts on account of the purchase money, and fully arranged for the payment of the balance, and otherwise fully completed

the sale, so far as necessary. Under these circumstances the court held, among other things, that where the quantity and general mass, from which it is to be taken, are specified, the subject of the contract is thus ascertained, and it becomes a *possible* result for the title to pass, *if the sale is complete in all its other circumstances &c.* And the title may also pass, where goods are delivered by the vendor to the purchaser, although no fixed price is agreed upon. Thus, in *Joyce* agt. *Swann*, (17 *Com. B. N. S.*, 84, 1864), cited by plaintiffs, the question was whether or not one McCaster had an insurable interest in a certain quantity of guano, at the time of effecting the policy, and the judge charged the jury to the effect that, if the guano was put on board the vessel by the vendors, with the intention of passing the property to McCaster, they must find for the plaintiff; and that it was not a necessary condition to the passing of the property, that the price should be definitely agreed on. The jury rendered a verdict for the plaintiff.

WILLIAMS, J., who delivered one of the opinions *in banco*, approves the verdict on all the facts in the case, and says, that—"where, from all the facts in the case, it may fairly be inferred, that it was the intention of the seller to pass the property in the goods shipped to order, the mere fact of the bill of lading being taken in the name of the seller, will not prevent its passing; but if the bill of lading was retained to hold dominion over the goods, that then there was no intention to pass the property; but if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result. In this case the bill of lading was in the name of the seller."

Such cases, however, are exceptions to the general rule, and they merely decide that the title may pass where it is the clear and positive intention of both contracting parties that it shall pass. But the old rule which held that upon a sale of a *specific chattel*, notwithstanding the postponement

of *payment and delivery*, the right of property may in some cases become vested in the vendee, while the right of possession only continues in the vendor until the payment of the purchase money, has not only been modified in this state in all cases where payment and delivery are to be in futuro, and are to be simultaneous and concurrent acts (*Benedict* agt. *Field*, 16 *N. Y.*, 595–7; *Baker* agt. *Bourcicoult*, 1 *Daly*, 24; *Russell* agt. *Minor*, 22 *Wend.*, 664–671; *Chapman* agt. *Lathrop*, 6 *Cow.*, 110); but also in cases where the contract shows that there is no intention to pass the property, until something further is done by the seller. In such cases it has been held that the sale is not perfected and the property does not pass until the thing be done. (*Ward* agt. *Shaw*, 7 *Wend.*, 404; *Chapman* agt. *Kent*, 3 *Duer*, 232.)

In the case under consideration the defendant had until the 31st day of December, 1867, to exercise his option. The plaintiffs and the defendant are stockbrokers; they dealt with each other as such; it may be assumed that the plaintiffs were well acquainted with the rules and custom prevailing among brokers as to the sale of stocks, and with the fact that it was not necessary for the defendant under his contract to have the 1,000 shares of stock actually on hand. Formerly such a contract was a mere wager and illegal by statute, whenever the seller did not possess the stocks at the time (*R. S. Art.* 2., *tit.* 19, *ch.* 20, §§ 6, 7 *and* 8); but this statute was repealed by an Act entitled "An Act to legalize the sale of stocks on time" (4 *Edm. R. S.*, *p.* 110), and in this repealing statute is an express provision that thereafter no contract for the purchase, sale, &c., of stocks shall be void, because the vendor at the time of making the contract is not the owner of the shares. This statute therefore legalizes contracts for the sale of stocks on time, and which the vendor does not own. The plaintiffs undoubtedly were familiar with it, and it cannot therefore be said in the light of this statute, and the contract palpably drawn under it, and also in the light of the object of the contract, that

the defendant contracted for the delivery of a certain specific lot of 1,000 shares, or warranted the present possession by him of any such lot, on the 18th day of February, 1867.

For the purpose of carrying out his contract as made, it was not necessary for the defendant to be a stockholder on the books of the company at any time; it was sufficient if on the 31st day of December, 1867, he held a certificate representing 1,000 shares, with the necessary power of attorney to transfer the same, and if he held such certificate at any time prior to said date, he had a right to use it, and the number of shares represented thereby in his business, in any manner he saw fit, until that day. The rule, therefore, that a vendor impliedly warrants his title to what he assumes to sell, and consequently warrants the existence of what he assumes to sell, does not, since the passage of the statute referred to, necessarily apply any more to contracts for the sale of stocks on time, and for this reason it is unnecessary to notice or examine the numerous authorities cited by plaintiffs' counsel in support of the application of the rule referred to to the contract in this case. Under the said statute, a party may make a contract for the purchase of stocks on time with a person who neither owns the stock, nor has the possession or control of it; but if the purchaser fails to guard his own interests by express stipulations against the dilution of the stock by the company, by which it has been issued, it seems to me the contract may afterwards be satisfied by the delivery of stock as it exists on the day the contract is to be performed, and unless the purchaser insists in his contract upon all dividends, profits and advantages which may be declared upon or spring from the stock during the running of the contract, he should not, in my judgment, be afterwards permitted to make claim to them. A little prudence exercised at the proper time will enable him to secure all his contemplated rights in this respect.

Again, as the defendant was under no obligation to be a stockholder on the books of the company, nor to have a

certificate for 1,000 shares ready for delivery prior to the 31st day of December, 1867, how can it be said that it was his duty on or about the 10th day of April, 1867, to subscribe for 1,000 additional shares, which he could do in no other way except by becoming a stockholder upon the books of the company before that time, and to furnish the necessary funds to the amount of upwards of fifty thousand dollars to meet his subscription? Of what value would the option, he expressly reserved to himself, be in such case?

All these circumstances tend to show that the contracting parties at the time of the execution of the contract could not have contemplated that the title to the shares should pass.

It has been conceded by plaintiffs' counsel that the justice who tried this cause was correct in holding, that dividends declared and additional shares issued, when declared and issued, become the property of those who own the stock, in respect whereof they are declared and issued at the time of said issue and declaration, and that they are not incorporated in, nor do they become a part of that stock in respect whereof they are issued, but are mere profits arising therefrom to the then owners thereof. There can be no doubt of the correctness of this proposition generally, although, strictly speaking, the profits do not arise from the stock, but are earned by the corporation, and are distributed to such owners as are recognized as such on the books of the company.

In *Spear* agt. *Hart*, (3 *Robertson*, 420) the dividend had been declared before the sale, but was payable after the day fixed for the delivery of the stock, and the court held, "that the dividend belonged to the defendant and did not pass to the plaintiff under the contract. Dividends are not an inci dent to stock, so as to pass with the stock. Unlike interest, they are not earned by the money represented in the stock, but by the corporation; and are divided among the share holders, and may be sold or assigned without parting with the stock.

Kelly agt. *Upton*, (5 *Duer.*, 336), is a case presenting the same questions as the case now under consideration, with the difference, that in that case the option was on the part of the *buyer*. The court held that the contract was executory, that where the delivery of the thing sold, and the payment of the price are to be simultaneous acts, the title, until delivery or payment, remains in the seller.

The two cases last referred to seem fatal to the first three claims of the plaintiffs'. They expressly decide that the contract in this case must be considered as an executory agreement, passing no title to the plaintiffs, however different their understanding of its effect may have been, and that the dividends and accretions as a general rule follow the title.

The plaintiffs, notwithstanding, however, claim that, although this may be so, the provision in the contract in this action that the purchasers should pay interest on the contract price from the date of the contract, is such a peculiar and controlling feature in the said contract in respect to its interpretation as to take it out of the operation of the general rule, that in consequence thereof it should be so interpreted as to hold the vendor liable to deliver the profits with the shares sold. The contract in *Kelly* agt. *Upton*, (5 *Duer.*, 336) contained the same feature. The learned counsel for the plaintiffs contended for the correctness of this theory so strenuously and persistently that in view of the importance of this case I made a complete and thorough examination and classification of the numerous authorities cited by the plaintiffs promiscuously upon this point. They establish the following principles:

I. In case of non-performance of a contract *at the time* fixed for the completion of the same, *without willful fault* on *either side*, the purchaser as a general rule is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possssion of the estate; and as from that time the money belongs to

the vendor, the purchaser will be compelled to pay interest for it, if not paid at that day (2 *Sugd., V. & P.*, *793; *Ackland* agt. *Gaisford*, 2 *Maddock*, 28, 1816; *Champernowne* agt. *Brooke*, 3 *Clark and Finnelly's appeal cases*, 4, 1835).

II. Where, however, interest is more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, although he may be free from personal misconduct, as for instance where the delay is caused by a defect in the vendor's title, which may be unknown to him, to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the court therefore in such case gives the vendor no interest, but leaves him in possession of the interim rents and profits; and therefore, in such case, where a good title is not shown until a given period, the purchaser will pay interest only from that period, and he will, of course, take the rents from the same time (*Sugden on Vend. & P.*, *806, §46).

III. Where the non-performance and delay has been occasioned by the willful default of the vendor, and the vendor has received interest, or has remained in possession, and in the meantime the property has diminished in value or has been deterioated by permissive waste, the purchaser is entitled to compensation, which may be decreed according to the circumstances of each case either by adjudging the vendor not entitled to interest on purchase money, but on the contrary accountable not only for the rents actually received but also for those which he might have received but for his willful default (*Sugden on Vend. & P.* *807, §44; *Regents' Canal Co.* agt. *Ware*, 23 *Beavan*, 575, 1857, *Lord* ROMILLY).

IV. But where there is an express stipulation in the contract, that if the conveyance is not executed and the purchase money paid by the day named, interest shall be paid by the purchaser until the purchase is completed, the terms of that stipulation apply to every kind of delay, except such as may be occasioned by the *willful* default of the vendor.

In such cases the interest does not depend upon any rule of the court, but open the *express stipulation* of the parties, and the terms of that stipulation apply to every delay, however occasioned, except the *willful* default of the vendor or such other delay as may be expressly excepted from the operation of the contract; and whether in such cases the interest exceed the mesne profits or not, the purchaser *must* pay interest *according to his stipulation* (*Lord Palmerston* agt. *Turner*, 33 *Beavan*, 525, 1864, *Lord* ROMILLY, *in which case the purchaser was held to pay interest at 4 per cent.*; *William* agt. *Glenton*, 34 *Beavan*, 528, 1865; *Tewart* agt. *Lawton*, 3 *Smale and Gifford*, 307, 1856, *V. C.* STEWART).

V. If, after the contract and before the conveyance, the estate, or a particular and specified fund, or a vested right or specific interest, be improved or increased, or if the value be lessened without any fault on either side, the vendee has the benefit and sustains the loss. (*Sugden on V.* *819 § 98; *Anson* agt. *Towgood*, 1 *Jacob and Walker's Chancery R.*, 617, 1820; *Vesey* agt. *Elwood*, 3 *Drury & Warren*, 74, 1842; *Kimberley* agt. *Tew*, 5 *Irish Eq.*, 389, 1843; *Davy* agt. *Barber*, 2 *Atkins*, 490, 1742; *Small* agt. *Atwood*, 3 *Young & Collyer's Exch. R.*, 105, 1838).

The cases, so far examined, refer either to a specific estate in lands a specific interest in a particular fund, a specific vested right, or other specific property fully described and clearly identified, and, therefore, have no application to a contract for the sale of stocks generally, which may or may not be in the possession of the seller, which are not described so as to be capable of being distinguished and identified. The decision in each of said cases was made upon entirely different principles from those governing the sale of stocks on time. The profits and rents of an estate run with the land and come out of it; the interest and other accumulations attach to a specific fund and become part of the same. It is different, however, with stocks. Again it will be observed, that in every case so cited, there was either a default

on the part of the vendor in carrying out his contract, or, at any rate, the other party suffered delay in receiving what was coming to him; but notwithstanding this, the purchaser was invariably held to the terms of his contract, whenever he had stipulated to pay interest. In the case under consideration, the vendor did not make any such default.

VI. The next following additional cases cited by the plaintiffs simply decide that whenever a debtor is in *default* for not paying or repaying money, delivering property, or rendering services in pursuance of his contract, he is chargeable with interest from the time of *his default*, on the specified amount of money or the value of the property or services, at the time they should have been paid or repaid or rendered (*Van Rensselaer* agt. *Jewett*, 2 *Comst.*, 140; *Rensselder Factory* agt. *Reid*, 5 *Cow.*, 587; *Cleveland* agt. *Burrill*, 25 *Barb.*, 538; *Viele* agt. *Troy and Boston R. R. Co.*, 21 *Barb.*, 396).

As the defendant in this case, under his option, had the right to postpone the performance of his contract until long after the dividends had been declared and the additional stock issued, it is very clear upon the principles laid down in the cases above cited, that he could not have made default, so as to entitle the plaintiffs to these dividends and accretions, upon the mere ground that they had voluntarily agreed to pay interest from the date of their contract.

VII. The decision in the cases of *Courtney* agt. *Ferrers*, (1 *Simons*, 137, 1827); *Webster* agt. *Donaldson*, (34 *Beavan*, 451, 1865), *Terry* agt. *Wheeler*, (25 *N.Y.*, 520, 1862), turns upon the peculiar circumstances of each case.

In *Courtney* agt. *Ferrers* the assignment of the policy assigned "the policy *and all* moneys, benefits and advantages to arise, accrue or become due or payable upon or by virtue of it in any manner," and the vice chancellor therefore held that the whole fruits of the policy passed.

In *Webster* agt. *Donaldson* the plaintiff, in May, 1863, agreed to purchase an estate, including hay and crops, for £9,000—.The purchase was to be completed on the 24th of June, when plaintiff was to have possession, and if not then completed, the plaintiff was to pay interest at the rate of 3 per cent. on the purchase money *from that day*. By subsequent agreement, at the request of the *purchaser*, November was substituted for June. The contract was not concluded until February, following, when the plaintiff paid the purchase money, with interest only from the 29 *th of September*, 1863. In the meantime the vendors sold the hay and garden produce, and it was held that, under the altered contract, the plaintiff was not entitled to the hay or produce. The master of the rolls says: "I think that, having regard to the conditions of sale, the hay and growing crops were limited to those existing at the time of the conclusion of the sale; but as the purchaser was not to have possession until the purchase was completed, he could not properly gather the crops before that time."

And as the conditions, as varied, expressly stated that the purchaser is not to receive any of the rents or profits of the land until the 29th of September, the master very properly remarked, that there would be a manifest advantage given to a purchaser, by postponing the day for completion, if he were to have the crops exactly as if he had completed three months sooner, and yet escape payment of the three months' interest on the purchase money.

In *Terry* agt. *Wheeler* the title had passed, and SELDEN, J., made the remark quoted by plaintiffs' counsel to show that in a case of that kind the risk as well as the increase attends upon the title and not upon the possession.

In *Sheldon* agt. *Sherman*, (42 *Barb.*, 368), there was no contract of any kind, and the case was decided upon the principles of common justice. And, in *Scranton* agt. *Booth*, (29 *Barb.*, 171), where the parties differed in their understanding as to the rent agreed between them, it was held

that the tenant must pay what the premises were reasonably worth.

I cannot see how these two cases can be relied on as authority for the alteration of the plain terms of a written contract executed by both parties, or the interpolation of an additional obligation into the contract not contemplated by the parties at the time of its execution.

In *Messenger* agt. *The city of Buffalo* (21 *N.Y.*, 196) the city was held to have impliedly assented to the alteration of the contract, because by its action it had rendered the performance of the plaintiff's action impossible.

But what has the defendant in this case done so as to entitle the plaintiffs to an enlarged meaning of their contract?

In *Allamson* agt. *The mayor &c. of the city of Albany*, (43 *Barb.*, 33, 1854), the question simply was whether a covenant in the plaintiffs' contract "that the plaintiff will commence said work and will proceed therewith without delay, and in such a manner as not to delay the contractor for the mason-work," imposed upon the defendants the obligation to have the building in readiness for the plaintiff to perform the condition, and the court held that, unless it did, it would be a contract merely *on one side*, with no corresponding obligation, no duty to be performed on the part of the other contracting party.

To the same effect is *Churchward* agt. *Reg* (1 *C. L. Q. B.*, 173, 1865).

These cases merely decide that in some instances, where a contract would be void for want of mutuality, a correlative and corresponding obligation on the part of the other party will be implied, so far as it may become necessary for the purpose of sustaining the contract, but no more. But this doctrine cannot in any case be relied on as a justification for the imposition of a new, distinct, and additional obligation not embraced within the plain terms of a written

contract, which has been executed by both parties and which clearly defines their mutual rights and obligations.

The foregoing examination of the cases cited and relied upon by the plaintiffs wholly failed to disclose a principle or theory upon which the plaintiffs' claims would be sustained. On the other hand, the cases of *Decker* agt. *Furniss* (4 *Kern.*, 612), *Kelly* agt. *Upton* (5 *Duer*, 336), and *Spear* agt. *Hart* (3 *Robt.*, 420), are such direct authority for the proposition that the contract in this case is executory only; that the title did not pass, no matter how the plaintiffs considered it; that the dividends and additional stock follow the title as recognized by the company, and that consequently the plaintiffs notwithstanding their agreement to pay interest, are not entitled to the dividends and additional stock claimed by them; that the first three claims of the plaintiffs must be disallowed.

The fact that the plaintiffs, under their contract, made six deposits in the United States Trust Company, cannot make any difference in this respect, for two reasons:

First—Because the justice, who tried the cause, found as matter of fact, that said deposits were made as security for the performance of the contract only; and,

Second—Because, even if they had been made as payments on account, as earnest money to bind the bargain, the contract would not have been changed thereby; for the true legal effect of earnest money is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both contracting parties; and the inquiry whether the title to the property has passed in such case is to be tested not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest.

As to the *fourth* claim of the plaintiffs—

If the defendant is liable at all, he is so for the simple breach of the contract to deliver the stock, the vendees not having paid to him the purchase money in advance. The

justice, at special term, has found, as matter of fact, that the six deposits made by the plaintiffs in the United States Trust Company, were made as security for the performance of the contract on their part, and this finding cannot be disturbed. The defendant had, until the 31st day of December, 1867, including the whole of that day, for the performance of the contract on his part, and I do not perceive how he could make default so as to incur a liability to respond in damages, except upon a tender of the purchase money made by the plaintiffs after that day. No such tender has been made. But, as this point has neither been raised nor discussed, it may not be fair to decide the case upon this ground.

If, then, there has been any breach on the part of the defendant, it must have occured, according to the evidence, either on the 19th or 31st day of December, 1867, and the measure of damages in such case is the difference between the contract price of the stock and the market price on the day of the breach, with interest from that day. (*Clark* agt. *Pinney*, 7 *Cowen*, 681; *Taylor* agt. *Read*, 4 *Paige*, 561; *Dey* agt. *Dox*, 9 *Wend.*, 129; *Davis* agt. *Shields*, 24 *Wend.*, 322; *Beals* agt. *Terry*, 2 *Sandf.*, 127; *Dana* agt. *Fiedler*, 2 *Kern*, 40; *Norton* agt. *Wales*, 1 *Robt.*, 568.)

The market value of the stock on these days, as proved, compares with the contract price as follows:

ON DECEMBER, 19th.

Contract price at 128, with interest thereon from February, 18, 1867, at six per cent..... 134 2-5
Market value..... 132⅞

ON DECEMBER 31st.

Contract price, with interest thereon from February 18, 1867, at six per cent.....134⅜
Market value.....131⅝

This comparison shows that the market value of the stock on either of said days was less than the contract price, and

consequently the plaintiffs, even if there was a breach by the defendant, sustained no actual damage.

The justice, at special term, was therefore right in holding that this rendered it unnecessary to consider whether there was such breach; and it follows that the exceptions taken and filed by the plaintiffs to the findings of said justice as well as to his refusal to find certain other facts, are, and every one of them is, clearly untenable.

The judgment appealed from should in all respects be affirmed, with costs.

MONELL, J.—I concur.

COURT OF APPEALS.

JOSEPH STRINGHAM, appellant agt. THE ST. NICHOLAS INSURANCE COMPANY, respondents.

Where the power of an *agent* of a *fire insurance company*, consists almost entirely—
1st. Of authority to receive applications for insurance and make them binding upon the company for the period of ten days; and at the expiration of that time, if the company do not assume the risk, it terminates:
2d. To receive the premiums or renewals of policies and transmit the same to the company and if accepted by them, on the receipt by him of the renewal certificate signed by the officers of the company, to deliver the same to the assured; such power does not authorize the agent to sign *consents*, on behalf of the company, to *assignments* of policies of insurance.

To bind the company to assignments of policies by an agent, his character as agent must be established and of so *general a nature* as to give him authority to do the act in question; or *subsequent ratification* by the company with full knowledge, must be established.

The fact that the agent has entered in a book, called the policy register, which has been furnished him by the company, the consents to assignments of policies, without any knowledge on the part of the company of such entries, does not constitute a *general agency* which would authorize him to consent to such assignments.

January Term, 1867.

APPEAL from a judgment at general term in favor of the defendants.

W. DORSHEIMER, *for appellant.*
J. C. DIMMICK, *for respondents.*

DAVIES, Ch. J. This is an action upon a policy of insurance, issued by the defendants to one L. Austin Spaulding, on the 12th day of July, 1856, in the sum of $3,000, upon a stone flouring mill and machinery therein. On the 30th of June, 1857, upon payment by Spaulding, the policy was renewed for one year, from July 12, 1857, to July 12, 1858. On the 25th of August, 1857, Spaulding assigned the policy and all his interest therein to U. H. Wolfe, and on the 5th

day of October, 1857, Wolfe assigned the policy and all his interest therein to the plaintiff. The property covered by the policy was totally consumed by fire on the 15th of November, 1857. The policy contained this clause: "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

Upon the back of said policy were printed two blank consents, as follows: "The St. Nicholas Insurance Company of the city of New York, hereby consent that the interest of in the within policy be assigned to , subject nevertheless, to the conditions therein contained. , Secretary."

The said consents were filled up and signed previous to the execution of said assignments, respectively, on the 25th of August and 5th of October, 1857, so as to read as follows: "The St. Nicholas Insurance Company of the city of New York hereby consent that the interest of L. A Spaulding in the within policy be assigned to U. H. Wolfe, subject nevertheless, to the conditions therein contained.

H. A. Brewster, agent.'

The second consent was in all respects similar, except that the name of U. H. Wolfe, appeared in place of L. A. Spaulding, and that of Joseph Stringham in place of U. H. Wolfe. The word "secretary," in each of said consents, was erased, and the word "agent' written in its place. The defense was, that as the company had never given its consent that the policy might be assigned to Wolfe, and by Wolfe to the plaintiff, and the same having been assigned without such consent, the policy had become void and of no effect. The referee who tried the action determined that the company had never given its consent to such assignments; that the consents given by Brewster, as agent, were unau-

thorized, and not binding on the company; and thereupon dismissed the complaint and gave judgment for the defendants, which, on appeal, was affirmed at the general term. The plaintiff now appeals to this court. The only question seriously controverted upon the trial was whether Brewster had authority to assent, on behalf of the company, to the assignments by Spaulding and Wolfe.

The plaintiff sought to establish such authority upon the grounds:

1. That Brewster had, on the 5th of September, 1857, notified the defendants that Spaulding's interest in the policy had been assigned to Wolfe, and that the company had by silence ratified the same.

2. That Brewster, as agent of the defendants, had authority to grant the assent of the company to those assignments.

The first position was sought to be established by the testimony of Brewster. It had appeared on the trial that the secretary of the defendants, under date of December 4, 1857, wrote to Brewster, informing him that the plaintiff claimed for a loss under policy No. 13,495, and renewal thereof, issued to L. A. Spaulding, on flouring mill at Lockport, and stating, "as we have no evidence on our books of there having been any change of interest, except to L. Austin Spaulding, we inclose a copy policy as recorded on our books. If there has been any further change, please write it out in full, as it is in the original, and return it to us at your earliest convenience." On or about the 26th of December, 1857, Brewster returned the copy policy, with an entry in red ink written in it after "other insurance permitted without notice until required," as follows: "I find a memorandum on our record, 'August 22, 1857, assigned to U. H. Wolfe, October 3, 1857, assigned to J. Stringham, in trust.'" The copy policy with this memorandum therein was enclosed in a letter as follows:

Rochester, Dec. 26, 1857.

"W. S. SLOCUM, Esq.

DEAR SIR:—Enclosed I return you the policy you sent me, with entries on it made on my books, and as I supposed reported to you by my clerks. H. A. Brewster."

Slocum, the secretary of the defendants, testified: "All the responsible correspondence of the company was conducted by me, and passed under my scrutiny. Before the fire which destroyed the Spaulding mill, I had no knowledge that Brewster had signed a consent to the assignment of this or any other policy; no notice before that had ever come to me, or to the office, that I know of, that he had signed or given any such consent. Consent to assign policies, when given by the company, were signed by me as secretary."

Brewster testified that on the 1st of January, 1858, he transmitted to the defendants a copy of an account which was marked No. 2, which contained a memorandum at the foot thereof in these words:

"*Rochester, Sept.* 5, 1857.—Aug. 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe.

"True copy. H. A. Brewster."

The witness Slocum testified that in January or February, 1858, he was at Rochester, when the witness Brewster cut a leaf from his letter book and gave it to him. It was an impression taken by letter press, and was in these words:

"H. A. Brewster, In account with the St. Nicholas Fire Insurance Company. Dr.

1857. Aug. 6, for prem. of Chas. W. Thompson, No. 17,385.....$15.00

Cr.—By 10 per cent. commission on $15.00 150

Balance in hand of E. Pond, assignee.. 13.50

$15.00–$15.00

Sept. 6. To balance of acct. as above.....$13.50.

E. E.

"*Rochester, Sept.* 5, 1857."

"August 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe. "H. A. Brewster, agent."

A letter dated Sept. 5, 1857, by H. A. Brewster to the defendants, was produced by the defendants, on the plaintiffs call, and marked No. 3, and the account inclosed was also produced and marked by the referee No. 4, and which account, marked No. 4, was in the words and figures following:

"H. A. Brewster, In account with the St. Nicholas Fire Insurance Company. Dr.

1857. Aug. 6, for prem. ot C. W. Thompson, 17,385.....$15.00

Cr.—By 10 per cent. commission 1.50

By draft $13.35, and exchange to bal. 13.50

$15.00-$15.00

E. E.

"*Rochester, Sept.* 5, 1857."

Slocum further testified: "I opened the letter No 3, which had inclosed in it the paper No. 4, and nothing else. No. 4 was then just as it is now. It had nothing more upon it. We never received, to my knowledge or information, any paper from which this letter-press copy is an impression, nor any notice before the loss, of the assignment or of Brewster's consent."

The witness Brewster then testified that the leaf produced by the witness Slocum was the one he (Brewster) cut from his letter-book; that it was an impression taken in his letter-book from No. 4, by his letter-press. Both were in the handwriting of his clerk, Davis. That the words in the letter-press copy, "August 27. No. 13,495, assigned by L. A. Spaulding to U. H. Wolfe," must have been cut off from No. 4, since it was inclosed to defendants.

It is stated in the case that, "on comparison by counsel of the respective parties, and the referee, it was evident be-

yond dispute, that the said letter-press copy was not an impression from No. 4; the lines were not of the same length; the same words which were written upon and composed one line in the one, were written on, and made two lines in the other. The same word was written out in full in the one, and abbreviated in the other. In the letter-press copy the lines under the figures were in red ink, and upon No.4 in black ink. The blank paper at the bottom of No.4, below the writing, more than covered the whole of the impression on the letter-press copy." It might have been added that the words, "balance in hand of E. Pond,assignee," appear in the letter-press copy, and are not in No. 4, but in lieu thereof the words, "by draft 13.35, and exchange to bal;" and that in the letter-press copy appear these words: "Sept. 6. To balance of acct. as above," and which do not appear at all in paper No. 4. It is too clear to need further illustration, that Brewster was greatly in error in testifying that the leaf produced was a letter-press copy of paper No. 4, and that the latter had been mutilated, as well for the purpose of concealing the fact that the defendants had notice of the assignment of Spaulding to Wolfe, as to convict them of a great fraud in manufacturing testimony. This bungling attempt to fasten notice of the assignment of Spaulding to Wolfe upon the defendants, was a signal failure, and justly casts great discredit upon the other testimony of Brewster. It is not now urged that the defendants had any notice of these assignments prior to the destruction of the property covered by the policy, and therefore all pretence of ratification or assent thereto by the defendants is abandoned.

It is now contended, however, that Brewster, as agent of the defendants, had authority to grant the assent of the company to these assignments. It is very apparrent from the testimony and the correspondence between Brewster and the company what his powers were.

1. He had authority to receive applications for insurance, and make them binding upon the company for the period of ten days. At the expiration of that time, if the company did not assume the risk, it terminated.

2. He had power to receive the premiums or renewals of policies and transmit the same to the company, and if accepted by them, on the receipt by him of the renewal certificate, signed by the officers of the company, to deliver the same to the assured. His duties seem to have been confined almost exclusively, if not entirely, to these two matters. I do not attach any importance to the statement, made by Brewster, that his impression is that he executed other permissions to assign policies; he says, "it is an impression; I cannot state positively if such were executed, and I cannot say that they were"—for the reason already suggested, and for the additional one, that the statement is very vague and indefinite. If he had been in the practice of granting such consents, he could easily have ascertained the fact and mentioned the instances. The isolated case referred to in defendants' letter of February 13, 1856, wherein they state, "we have also noted the assignment of 8705, as requested," is too indefinite and uncertain to show that the agent had a general authority to give similar consents in other cases.

But the language of the policy, and the blank consent printed on the back thereof, unmistakably indicate the steps to be taken by a policy holder, when a consent to an assignment was desired, and the officer or agent only authorized to give the consent to assignments. As already observed, the policy carried on its face notice to all holders, that the interest of the assured was not assignable, unless by consent of the corporation manifested in writing, and the printed blanks on the back of the policy were like notice of the form of such consent, and the officer alone authorized to give it, and manifest the assent of the company. It was full notice to all that it must be done by its secretary, and

the erasure by Brewster of the word "secretary," and writing in place thereof the word "agent," was an admonition to the parties that the authority to give the consent was in the secretary only. It is doubtless true that the person applying to Brewster for these consents may have supposed that he had authority to grant them, or if not, that his acts would be ratified by the defendants. But Brewster could not create an authority in himself to do the particular act, by its performance, or asserting his authority to do it. To bind his principal, his character as agent must be established and of so general a nature as to give him authority to do the act in question, or subsequent ratification, with full knowledge, must be established. The proof in this case falls far short of making out either of these positions. It was sought to bring home to the defendants knowledge of these assignments, by showing that Brewster had entered in books kept by him at Rochester the fact that he had given the consent to these assignments. To make the contents of these books knowledge to the defendants, it was proven that the defendants, on the application of Brewster, had paid for one of them a small sum, and that said book was kept in the office of said Brewster, and was lettered on the back, "St. Nicholas Insurance Company, Policy Register, Rochester Agency, 1855."

The person who procured said consents testified, that on both occasions of procuring the same, "I saw said policy register, and that Brewster entered in said policy register the fact of such permission and assignment, and its date," and that said person saw on these occasions each of said entries made. There was no evidence offered that the defendants or any of its officers ever saw said book, or had any knowledge of its contents; and it affirmatively appeared that all the knowledge they or any of them had in relation to said book, was derived from a letter written by said Brewster to the secretary of the defendants, under date of "Rochester, August 6, 1855," in which he says: "we find

it to be very necessary, as we advance in our business for you, that we should have a policy register for our own use. The companies we represent have generally preferred the purchase of a book here, and we charge it to them, though some prefer to send us books. Those we have cost us $3.50, and are expressly got up for us of a uniform kind. Can we order one for you?" To this letter, the secretary of the defendants replied, under date of August 9, 1865: "yours of the 6th instant is received. You are at liberty to purchase the necessary books on behalf of this company for the transaction of its business in your city.

The counsel for the plaintiff then turned to page 40 of said book, where the policy in suit is registered, and pointed out therein, against the description of the subject of insurance, the following entries in red ink:

"Assigned August 27, 1857, to U. H. Wolfe.

" October 8,1857, to Joseph Stringham,Buffalo."

The counsel objected to the reading of either of said entries in evidence from said book, and the referee sustained the objection, and excluded the evidence, and the plaintiff's counsel then and there duly excepted to such decision. It certainly cannot be successfully maintained, that the circumstance that the defendants paid or consented to pay for the cost of this register for Brewster's own use, changed in any aspect relations then existing between Brewster and the defendants. It is not suggested that the defendants, or any of their officers, ever saw the said register, or were at any time made acquainted with its contents, or the lettering upon it, or the particular purposes to which it was applied. It did not constitute Brewster the clerk of the defendants, or bind them by the entries he or his clerks made therein. Those entries were irrelevant to prove the fact that Brewster was the agent of the defendants to give their consents. That must be established by evidence *aliunde*, not by his acts or declarations.

Neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another, or the extent of his powers (*Scott* agt. *Crane*, 1 *Conn. R.*, 255; *Plumsted's lessees* agt. *Rudebagh*, 1 *Yeates*, 502, 505; *Lessee of James* agt. *Stookey*, 1 *Wash. C. C. R.*, 330).

Brewster testified that his agency for the defendants commenced upon the receipt of the letter from the secretary of the defendants of April 13,1855, and he produced the letter, and it was read in evidence. There was no proof that any other or greater powers were ever conferred upon him. It was in reply to a letter from Brewster, in which he says: "I should be glad to send your company risks, and can send you a good line at good rates." The defendants' secretary said: "your views with regard to a local agent to attend to the interest of our company in your city are correct. Should you feel disposed to send us applications of character mentioned in your letter, we will be happy to respond to them. As our directors do not allow agents to issue policies or make policies binding for terms of over ten days, as you can see by the inclosed receipts, we should restrict you also. * * * * We have not had any printed applications of our own, but intend to get some printed soon. Should you send any applications, you can for the present use such as you have on hand, substituting our name, &c. If desired, we will forward you some of our certificates to bind risks temporarily."

The certificates so forwarded were in this form: "St. Nicholas Insurance Company, No. 23, office corner of 8th avenue and 14th st., New York. This certifies that I, H. A. Brewster, agent for the city of Rochester, have received of dollars, being months premium on $ Insurance as per application No. , dated the day of , 18 , to be forwarded to their office as above for their action. It being understood and agreed between the parties that the said St. Nicholas Insurance Co. are not liable for this certificate beyond ten days from the date of the application

referred to, unless the risk is accepted and a policy made and delivered for the whole term of months, and in case the risk is not accepted the premium is to be returned.

(Signed) Wm. Wimshro, *president*,
Wm. S. Slocum, *secretary*.

"Dated this day of , 185 .

"Agent."

Brewster testified that he received these certificates as early as when he commenced business for the defendants, as aforesaid, and exhibited them freely and generally to customers and persons who transacted business with the company at said office, No. 1 Arcade Buildings. Under plaintiff's objection, Slocum testified that some time in the early part of the year 1857, a conversation was had at the office of the company, between the president of the company, the witness and Brewster, respecting his power as agent. He wanted authority to write or issue policies for the defendants; he said he could do a large business, and a more desirable class of business, if he could issue policies. "I don't recollect the particular words, but we declined, as we had not given such authority to agents."

It is then apparent that the powers of Brewster as agent were restricted to the receipt and forwarding to defendants of applications for insurance, and authority, to make a policy for only ten days: and the certificates which were exhibited to the customers generally, contained information of the character and extent of the powers of the agent. The declarations and acts of Brewster within the scope of his agency, if they had been admitted, would not be of any materiality. The declarations and representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency (*N. Y. Life Insurance and Trust Co.* agt. *Beebe*, 3 *Seld.*, 364; *Olding* agt. *Smith*, 11 *Eng. Law and Eq.*, 424; *Very* agt *Levy*, 13 *How. U. S. R.*, 345).

In the case in 3 *Selden* (*supra*), Schermerhorn, the agent, swore that he was the agent of the respondents in procuring a loan for them from the appellants, and it was contended for, on the part of the appellants, that respondents were concluded by his acts and representations, the same as if they were their own, upon the principle which pervades all cases of agency—that the principal is bound by all acts of his agent within the scope of his agency, which he holds him out to the world to possess, and that where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*. The court say: "The declarations or representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. But that was not the case here. Schermerhorn's agency was to obtain a loan for the respondents from the appellants. His alleged declarations, which are relied upon, were entirely without the scope of such or any other agency." In that case, there was no evidence to show that the respondents knew of the alleged representations of Schermerhorn, or that they ever authorized him to make them. So in the case at bar there is no evidence that these defendants ever authorized Brewster to give the consents to the two assignments mentioned, or that they ever knew that he had given such consents, until after the happening of the loss under the policy. We have seen what were the actual powers conferred by the defendants upon Brewster, and what was the scope of his agency.

Not only was the power to give the consents in question not within the scope of that agency, but the policy itself, and the blank consents indorsed thereon, gave notice to all holders of such policies that an agent of the company had no such power.

In view of all these considerations, the referee properly excluded the books kept by Brewster, and the entries therein. They were illegitimate to enlarge, alter or modify his power as agent.

The judgment of the supreme court affirming the judgment upon the report of the referee was correct, and should be affirmed with costs.

PARKER, J. The question litigated in this action is, whether H. A. Brewster was the agent of the defendants, and as such authorized to give their consent to the assignments of the policy, through which the plaintiff claims it.

The referee non-suited the plaintiff, on the ground that he had failed to show that the defendants had consented, as required by the policy, to the assignment of it, or that Brewster had any authority to give such consent.

It is very clear, I think, that Brewster had, in fact, no such authority. But it is insisted by the plaintiff's counsel that the company dealt with Brewster in such a manner that he was justified in holding himself out to the public as its general agent; that he did represent himself to the plaintiff as such agent, and, therefore, that the company is bound by his acts in signing the consent to the assignments. It is not contended that the plaintiff was induced to accept the consent of Brewster as that of the company, by any act of the company, implying or recognizing the authority of Brewster to give it, which came to the knowledge of the plaintiff, but that the acts of the company justified Brewster in assuming authority to give the consent, and therefore they are bound by it.

This is but stating, in another form, that Brewster was, in fact, the agent of the company, which proposition, as already intimated, I do not regard as sustained by the evidence.

Neither do I see anything in the evidence warranting the statement that the defendants had an office in Rochester, in charge of which Brewster was acting as clerk. The fact

that he was authorized by the company, at his request, to purchase at their expense a policy register, in which to keep an account of the business which he should do for the company, comes far short of establishing the fact claimed for it.

I think the non-suit was properly upheld by the general term, and its judgment should be affirmed.

All affirm.

QUEENS COUNTY COURT.

THE VILLAGE OF JAMAICA, respondents, agt. THE LONG ISLAND RAILROAD COMPANY, appellants.

AND THREE OTHER LIKE ACTIONS.

In the village of Jamaica, Queens county, N. Y., a village ordinance was passed in July 1868, entitled an "Ordinance in relation to manure and other offensive substances." The first section of which reads as follows:

"It shall not be lawful for any person, persons or corporations, to unload, discharge or put upon, or along the line of any railroad, street or highway, or public place within the boundaries of this village, any manure, offal or other offensive substances, from the first day of June to the first day of October, in each and every year, under the penalty of $50 for each and every offense. Nor shall cars or flats loaded with these or similar offensive substances, be allowed to remain or stand on or along any railroad, street or highway, in this village, under a like penalty of $50 for each and every offense."

On appeal from a judgment rendered by a police justice of the village of Jamaica, against the defendants for the penalty of $50, incurred under the last clause of section one of the ordinance above mentioned:

Held, 1st. That the answer of the defendants having expressly denied that they were a corporation, it was a *failure of proof* on the part of the plaintiffs in not proving the incorporation of the defendants.

2nd. That the act of the legislature, in 1866, creating the *metropolitan sanitary district and board of health* therein, which includes the towns of Jamaica, Flushing and Newtown, in the county of Queens, entirely *supersedes* the ordinance of the village of Jamaica, aforesaid, on this subject; and not only supersedes it, but *absolutely prohibits* any action by the village under the ordinance.

And 3d. That that part of the village ordinance under which this action is brought (if operative), is so broad in its language, as to interfere with the rights and privileges conferred upon railroad corporations by the general laws of the state, and is therefore *void*.

January Term, 1869.

APPEAL from a judgment of police justice, in the village of Jamaica, Queens county, N. Y.

A. HAGNER, *for respondent.*
JAS. W. COVERT, *for appellant.*

JOHN J. ARMSTRONG, County Judge. These actions were brought before the police justice of the village of Jamaica,

to recover a penalty of $50, in each action for a violation of an ordinance of the village, passed July 1, 1868, entitled an "Ordinance in relation to manure and other offensive substances." The section of the ordinance under which the actions were commenced is as follows:

"Sec. 1. It shall not be lawful for any person, persons or corporations, to unload, discharge or put upon or along the line of any railroad, street or highway or public place within the boundaries of this village, any manure, offal or other offensive substances, from the first day of June to the first day of October, in each and every year, under the penalty of fifty dollars for each and every offense. Nor shall cars or flats loaded, with these or similar offensive substances, be allowed to remain or stand in or along any railroad, street or highway in this villiage under a like penalty of fifty dollars for each and every offense.

These actions are brought under the latter clause of the section. This portion of the section is not so carefully framed as it should be. It is a distinct provision from the first portion of the section, and was doubtless intended to meet a class of cases where large quantities of offensive substances would be allowed to remain upon the cars for a length of time, exposed to the weather and poisoning the atmosphere, and making it offensive as well as detrimental to the health of the neighborhood. But who is to incur the penalty?

The ordinance fails to specify, excepting in suit number one, there is no proof that the cars or flats were upon the track of the defendants. Nor is there anything to show that the cars or flats belonged to the defendants, or were allowed to remain there by the assent or permission of the defendants; and in actions 2, 3 and 4, the defendants by their answer expressly denied that they were a railroad corporation. It became and was the duty of the plaintiffs, before a recovery could be had in these actions, to prove the

incorporation of the defendants. This has not been done, and upon this vital question there is a failure of proof.

There are, however, other questions upon which the police justice erred, and for which the judgment must be reversed.

The ordinance in question is a regulation for the preservation of the health of the village, and is passed under and in pursuance of the power contained in subdivisions 9 and 28 of title 4 of the village charter.

The legislature, for reasons deemed sufficient, in 1866 created the metropolitan sanitary district and board of health therein, and in the law creating this district and board of health, deprived the village of Jamaica of the power before exercised, as well as the right to make and enforce rules and regulations with reference to the matters embraced within the ordinance under consideration. (*Laws of* 1866, *ch.* 74, § 12, *chap.* 686, § 3; *Laws of* 1867, *chap.* 956, § 6.)

The object of the act of 1866 is declared in its title to be the creation of a metropolitan sanitary district, and a board of health therein, for the preservation of life and health and to prevent the spread of disease.

The bounds of this sanitary district comprise so much of the territory of the state as now comprises the metropolitan police district of the state of New York. (*ch.* 74 *of laws of* 1866, § 1.)

The towns of Jamaica, Newtown and Flushing, are within this district. By section twelve of chapter seventy-four of the laws of 1866, the authority, powers and duties, whether given by any law or by any ordinance made thereunder, for the purpose of preserving and protecting life and health or preventing disease, conferred upon or belonging to the board of health in the cities of New York or Brooklyn, "or elsewhere in said district," by this act "are *exclusively conferred* upon and shall hereafter be *exclusively exercised* by the aforesaid metropolitan board of health." It also provides that "no municipal body, or other authority in said dis-

trict, shall hereafter create or employ any officer or agent, or incur any expense under said (or other) health laws or ordinances, or in respect of any matter concerning which said board is by this act given control or jurisdiction. All of the aforesaid powers are to be possessed and exercised as fully as if herein repeated and separately conferred upon said board." This section twelve was amended by chapter 686 of the laws of 1866, in which it is declared that the powers of the metropolitan board of health shall be construed to include the ordering and enforcing in the same manner as other ordinances are provided to be enforced, "the removal of any obstruction, matter or thing, in or upon the public streets, sidewalks or places, which shall be in their opinion liable to lead to results detrimental to the public, or dangerous to life or health," and "generally the abating of nuisances;" and what is to be included in the term "nuisance," is specified by section six of chapter nine hundred and fifty-six of the laws of 1867, and this is declared to include "whatever is dangerous to human life or detrimental to health," whatever "renders the air, or human food or drink, unwholesome," and then by subsequent provisions of the act means are provided for maintaining actions in *any court* in the metropolitan sanitary district, for the abatement or remedying any of said nuisances, and by section twenty of this act of 1867, it is provided that no law heretofore enacted or hereafter to be enacted, shall be construed to repeal or modify any part or portion of the act, "or of any law relating to said board of health, or to the members of said board, their duties or powers," unless such laws shall *expressly* therein refer to and repeal or modify the same."

Thus it will be perceived that the power so conferred upon the metropolitan board of health, is a most enlarged one and exclusive in its operation. Whether it was wise or prudent to deprive the village of Jamaica of the powers that of right should belong to it and vest them in another body far removed from the village, it is not my province to deter-

mine. An application to the legislature is the only means by which the law can be changed, and the village restored to the powers and privileges it has been accustomed to exercise upon these subjects.

Again, the part of the village ordinance, under which this action is brought, is of a nature so broad in its language that it would be a question of some difficulty for a railroad company (authorized as it is by law to transport freight and passengers over their road) to pursue their business within the village of Jamaica, without incurring a penalty. The second provision of the ordinance is a prohibition against cars or flats loaded with manure, standing or remaining upon any railroad, street or highway, within the village, at any season of the year. The "standing or remaining," for a short space of time, while the freight train may be temporarily detained by an approaching passenger train, or the displacement of a rail or any other cause would, under this ordinance, subject the company so offending to the penalty. Instead of being a regulation it amounts to a prohibition and prevents the company from doing that which the legislature have given them the power to do. The authority of the trustees is limited, and their by-laws are to be reasonable (2 *Kyd on Corporations*, 107).

Whether the by-law is reasonable or not, is a question for the court. (20 *N. Y.*, 126; 3 *Pick.*, 162.)

While I am not disposed to give this portion of the ordinance any harsh or strict construction, as I might do, it being a penal ordinance, I cannot avoid the conclusion that the by-law as framed interferes with the rights and privileges conferred upon railroad corporations, by the general laws of the state, and is upon this ground void.

The judgment in each of the cases must be reversed with costs.

N. Y. SUPERIOR COURT.

CHARLES P. CURRIE *et al.*, plaintiffs and appellants, agt. CUMBERLAND G. WHITE, defendant and respondent.

The following brief opinion of Judge MCCUNN in this case, should have followed the opinion of the court by Judge FREEDMAN, on page 330, *ante*. Through some inadvertence, however, it got mislaid at that time. REP.

General Term, March, 1869.

MCCUNN, J. This case, though very elaborately argued, is susceptible, as I understand it, of a simple solution. The contract speaks for itself. It is to sell and purchase by the respective parties one thousand shares of the capital stock of the Hudson River Railroad Company. This agreement is set out in the complaint as the foundation of the action. Neither expressly nor by implication does the contract impose on the respondent an obligation to deliver to the appellants anything besides these one thousand shares, nor confer on the appellants any other right than to demand and receive delivery of these same shares. And surely the rights and obligations *inter sese* of the parties to the contract could not be affected by the action of strangers, *i.e.*, the Hudson River Railroad Company. Now, the respondent tendered performance of his agreement, pursuant to its stipulations, and the offer having been rejected by the appellants, who refused to accept fulfilment of the contract actually concluded between the parties, the respondent has a right to treat the contract as rescinded, and to claim a discharge from all its obligations. On these obvious and elementary principles, I think, the judgment below may be sustained, without the necessity of recourse to inferences and distinctions, which serve rather to obscure than to elucidate the decisive point in litigation.

SUPREME COURT.

JAMES L. BALDWIN, respondent, agt. GEORGE L. BROWN, appellant.

Where the plaintiff recovered a judgment of $50 damages against the defendant and $8.05 costs, before a justice of the peace, and the defendant appealed to the county court, specifying in his notice of appeal that the damages should have been for $5, and the costs of the justice, instead of $50:

Whereupon the plaintiff served an offer allowing the judgment to be corrected by being entered for $35, instead of $50, damages in his favor, which offer the defendant did not accept; and on the trial of the appeal in the county court, the plaintiff recovered $25 damages, *held* that the *plaintiff was entitled to costs.*

Had the defendant accepted the offer of the plaintiff, he would have been entitled to a judgment against the plaintiff for costs and disbursements before the justice of $20.05, which would have been more favorable to him than the reduction of the offer on the trial to $10.

Erie General Term, November, 1868.

Before MARVIN, LAMONT, DANIELS *and* BARKER, *Justices.*

ON the 17th day of April, 1867, the plaintiff, Baldwin, recovered against the defendant, Brown, a judgment of $50 damages and $8.05 costs, before a justice of the peace of the county of Erie.

The defendant appealed to the county court, specifying in his notice of appeal the particular in which he claimed the judgment should have been more favorable to him, stating that the damages should have been for $5.00 and the costs of the justice, instead of $50.00.

Whereupon the plaintiff served an offer, in writing, allowing the judgment to be corrected by being entered for $35.00 damages instead of $50.00 damages in his favor.

The defendant did not accept the proposed offer. The action was afterwards tried in the county court and a verdict rendered for the defendant.

Plaintiff moved in that court for a new trial upon a case and exceptions which was denied. The plaintiff then ap-

pealed to the general term of the supreme court and there obtained an order for a new trial.

On a second trial in the county court a verdict in favor of the plaintiff for $25.00 was rendered on the 29th day of May, 1868.

Both parties claimed to be entitled to costs and presented their bills to the clerk for taxation.

The clerk taxed costs to the plaintiff, and refused to tax the bill of the defendant.

On motion the county court set aside the taxation, and ordered the clerk to tax costs in favor of the defendant.

From this order of the Erie county court the plaintiff now appeals to this court.

WM. H. GURNEY, *for appellant.*
FRANK R. PERKINS, *for respondent.*

By the court, LAMONT, J. The plaintiff's offer in writing to allow the justice's judgment to be corrected by being reduced from $50.00 to $35.00 damages, entitles him to the costs of the litigation, unless it can be shown that the final recovery in the county court is more favorable to the defendant than was the plaintiff's offer. (*Code, sec.* 371; *Reed* agt. *Moore*, 31 *How.* 264; *Wallace* agt. *Patterson*, 29 *id.*, 170.)

The final verdict in the county court was in plaintiff's favor for $25.00 only. If we merely compare the two sums, the plaintiff's offer and his final recovery, the figures show that the vervict was more favorable to the defendant than the offer, by the sum of $10.00.

I am convinced, however, that the offer, in cases of this kind allowed to be tendered by section 371 of the Code, must be held to embrace all its necessary legal consequences and must be regarded as favorable, or unfavorable to the opposite party, tested by a rule that covers all its attendant advantages and disadvantages. Whatever occurs from such

an offer in money upon its acceptance is in reality parcel of the offer, attached to it by force of law.

The same section of the Code, which permits such offer to be made, also provides that if the offer be made and accepted by the appellant, the appellant shall recover all his disbursements on appeal and all his costs in the court below. It further provides that whenever costs are awarded to the appellant he shall be allowed to tax, as part thereof, the costs and fees paid to the justice on making the appeal as disbursements, in addition to the costs in the appellant's court, and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor (*Code, sec.* 371). The papers submitted show the sums to which the appellant would have been entitled on his accepting the offer in this case to be $8.05, the costs paid the justice, included in the judgment below, $2.00 paid the justice for making his return to the county court, and $10.00 defendant's costs before the justice, in all $20.05, for which the defendant on accepting the offer made him was entitled to a judgment to be entered in the Erie county court. (*Ponto* agt. *Phelps*, 36 *How.*, 19.)

If, then, the plaintiff's offer in effect tendered to the defendant what he would have been legally entitled to have by its acceptance, he would have been better off had he accepted the offer made than he now is with the verdict against him for $25.00.

This result is reached without computing interest on the offer from the time it was made, for the action being founded in tort, a trespass on the plaintiff's real estate, interest is not to be added. (*Smith* agt. *May*, 32 *How.*, 222.)

It follows that the clerk was correct in taxing costs in favor of the plaintiff. The order of the county court of Erie county, setting aside the clerk's taxation and directing the clerk to tax costs in favor of the defendant, must be reversed.

COURT OF APPEALS.

JOHN G. RITCHMYER, respondent, agt. BENTON G. MORSE and others, appellants.

Where a person erects a *building* upon the land of another, without any agreement or understanding whatever with the owner of the land; such building thereafter becomes real and not personal estate; and by a conveyance of the land by the owner, the title and right of possession to the building vests in the grantee of the land, although the building is claimed by a third person, who claims to have purchased it in good faith from a person not the owner of the land.

The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences—*per* BRONSON, J., *Mott* agt. *Palmer* (1 *Comst.*, 564).

January Term, 1867.

THE plaintiff claims in this action to recover the value of a certain building, located upon the lands of the defendants, which he claims as owner, and which was taken possession of and removed by defendants.

The building was erected by Mr. Vroman, in the fall of 1849, at which time the land upon which it was erected was owned by Alonzo C. Paige and others. It was a good frame building, as described by the plaintiff, 15 x 16 feet, 10-feet posts, nicely inclosed with pine sidings, pine shingles, a good cornice on one end, painted white with two coats; one door outside, and one inside; two windows—one in the front end, and one in the side, and a window in the back end.

There was a partition in it lathed and plastered, counter and shelves in the front part of the building. The building stood on a foundation of loose stones, with a back chimney in it. The plaintiff purchased it on the 21st of November, 1859, having previously occupied it for six years. The defendants removed it in December, 1860. The plaintiff testified he did not know by whose authority the shop was built there. Did not know for whose benefit Vroman built

it. He did not know that Vroman occupied it as tenant of anybody when he erected the building.

The defendants then proved that on the 16th day of June, 1860, they entered into a written contract with Paige and Potter, then the owners of the land upon which said building was located, and agreed to pay therefor the sum of $2,500 on the execution of a good and sufficient deed therefor, and that the defendants took possession of said land under said contract; that they were in possession under that contract at the time the shop was removed; that there were several other buildings on this lot at the time they bought, and the defendants took possession of the whole lot and all the buildings, including this shop; that the defendants subsequently received a deed for said premises, pursuant to the terms of their contract; that the defendants have occupied all the premises since the contract to them.

The judge charged the jury that, as matter of law, the plaintiff was entitled to recover. To which charge the counsel for the defendants there and then duly excepted. The judge further charged that the only question for the jury to consider was the question of damages, and to this the defendants also excepted.

MAYHAM & DYER, *for appellants.*
J. W. MILLER, *for respondent.*

DAVIES, Ch. J. I think the learned judge at the circuit was in error in holding, as a matter of law, that upon this testimony the plaintiff was entitled to recover. That testimony showed, in brief, that the plaintiff had become the purchaser of a building erected upon land owned by the defendants, and that the defendants had taken possession of the building and removed it, as they clearly had a right to do, if it was attached to the freehold, and passed under the contract and conveyance to them. That it did so pass is established by authority (*Mott* agt. *Palmer*, 1 *N. Y.*, 564). In

that case Judge BRONSON said: "The word 'land' includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences. This is but common learning; and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mine and quarries in the ground."

The cases relied upon to take this case out of this well-recognized and firmly established rule of law, do not apply to the facts as proven on the trial of this action.

In the first place it was not established that this building was erected upon any agreement between Vroman and the then owners of the fee of the land, that it was to be considered strictly a personal chattel. Second, it was not proven that the building was erected by a tenant, for the purposes of his trade and business, or that the relation of landlord and tenant ever existed between Vroman and the defendants' grantors, or between them and the plaintiff. The first proposition was necessary to be established to make applicable the doctrine of the case of *Smith* agt. *Benson* (1 *Hill*, 176). In that case, COWEN, J., said: "Thus both parties agreed to consider it (the building in question) as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremovable. *Prima facie*, such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them by an express agreement. They have in effect stipulated that the placing this building on the grounds should work nothing more toward changing its nature than if it had been the loose timber of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and re-

mainder-man; and surely, the parties may, by express agreement, do the same thing and even more."

Equally inapplicable is the doctrine of *Ombony* agt. *Jones* (19 *N. Y. Rep.*, 234), as the second proposition above stated was not established by proof. The rule to be gathered from the case is there stated thus by Judge GROVER: "That a tenant may remove, during his term, all erections made by him for the purpose of trade that can be removed without injury to the land or something attached thereto."

But in the case at bar no tenant sought to exercise such right during his term. There is an utter failure to establish the first foundation for invoking the aid of such a principle, viz.: that the relation of tenant at any time existed. When that fact was proven, it then would have been needful to show that the building in question was erected by the tenant for the purposes of trade or his business, and that he exercised his right of removal during his term.

Upon the facts proven upon this trial there can be no doubt that the defendants were the owners of the building in controversy, and it follows that the plaintiff is not entitled to recover its value. The learned judge erred in charging the jury that, as a matter of law upon the facts proven, the plaintiff was entitled to recover. The judgment must be reversed and a new trial ordered, costs to abide the event.

PARKER, J. If the building in question is to be deemed to have been a part of the realty, the plaintiff was not entitled to recover for its appropriation by the defendants.

It is undisputed that Vroman, who built it, was not the owner of the land on which it was built, either in fee or as a tenant for life or years; nor is there any evidence tending to show that he built it, pursuant to any agreement or understanding whatever with the owner of the land. So far as appears, he was a trespasser in erecting it upon the land where it was placed.

Under this state of facts there can be no doubt that it became, when erected, a part of the land on which it was

erected, and thenceforth real and not personal estate. (*Smith* agt. *Benson*, 1 *Hill*, 176; *Miller* agt. *Plumb*, 6 *Cow*,, 665; *Ford* agt. *Cobb*, 20 *N. Y. R.*, 344; *Murdock* agt. *Gifford*, 18 *N. Y. R.*, 28; *Snedeker* agt. *Warring*, 2 *Kern.*, 170; *Ombony* agt. *Jones*, 19 *N. Y. R.*, 234.) It was sufficiently fixed to the freehold. (*Smith* agt. *Benson*, *supra*; *Goodrich* agt. *Jones*, 2 *Hill*, 142; *Bishop* agt. *Bishop*, 11 *N. Y. R.*, 123; *Mott* agt. *Palmer*, 1 *Comst.*, 564.)

There can be no doubt that as between vendor and vendee it would be held to be real estate, and pass by the deed of the land. The same rule must apply as between these parties.

Nothing occurred after the erection that changed the property from real to personal. All that the plaintiff swears to in reference to his interview with defendant Reed, comes far short of producing such effect. It may be said that it shows an admission that plaintiff was entitled to pay for the building. If any admission is shown it is not that plaintiff was entitled to pay from defendants, but from their grantors, which was equivalent to a claim of ownership, as between defendants and such grantors.

What the plaintiff says he told Luman Reed in regard to his conversation with John Reed is no evidence of such conversation with John, for he does not testify that he said it.

I am unable to see any legal ground to recover, and am of the opinion that the judgment appealed from should be reversed and a new trial ordered.

All concur, except PORTER, J.

Reversed.

SUPREME COURT.

ABRAM MYERS agt. JOSEPH D. WHITE.

A *notice of appeal* which fairly apprises the opposite party that the damages are excessive, is sufficiently specific under section 371 of the Code to call upon such party to make an offer.

If such party remains silent, he does so at his peril, and if the verdict on appeal is reduced ten dollars, the appellant is entitled to costs.

Albany General Term, September, 1868.
Before PECKHAM, INGALLS *and* HOGEBOOM, *Justices.*

BANKER & RISING, *for plaintiff.*
FORSYTH & FURSMAN, *for defendant.*

THIS was an appeal by the plaintiff from an order of the Rensselaer county court, refusing to strike out the costs which had been awarded to the defendant.

The plaintiff recovered a judgment before the justice, December 6, 1866, for $99 damages and $18.65 costs.

The defendant appealed to the county court, where, on the new trial, the plaintiff recovered $61.28. That part of the notice of appeal upon which the case turned was as follows:

"5. The defendant claims that the judgment should have been more favorable to him, in the following particulars:

That the judgment for damages is for too large a sum and ought not to have been given for more than $33.33 damages with $5 costs, instead of $18.65, if not so amended should be reversed."

The plaintiff did not make any offer.

The order, allowing costs to the defendant, was affirmed.

The opinion was given by Justice PECKHAM, approving the case of *Fox* agt. *Nellis* (25 *How.*, 144).

SUPREME COURT.

In the Matter of the People *ex rel.* James D. McClelland agt. Joseph Dowling and Richard Kelly, Justices, &c.

It is a well settled rule in this state, that an application for a *mandamus*, rests in the sound discretion of the court, which will grant or refuse it according as the issuing or withholding it will best promote the ends of justice. And this is so, notwithstanding it may appear that the party applying is otherwise remediless.

On an application by the *relator, an attorney at law*, for a *mandamus* to compel the defendants, justices of the court of special sessions, in the city of New York, to allow the *relator* to practice in that court, from which he alleged they had debarred him:

Held. 1st. That a refusal to listen to the *relator* in a single case, cannot alone be regarded as debarring him from practice in that court, and therefore would not justify it.

2nd. That the only act of the justices shown, related to but one case, *which was ended* before this proceeding was initiated, and therefore his general rights not being affected, there was *nothing pending* in which the *relator* had any interest, which could give him a standing in court to ask for a mandamus. And

3d. That this court should hesitate long, before attempting to control, by mandamus, the action of magistrates who, even if it be conceded that they have exceeded the strict limit of their authority, are acting for the highest interests of the profession and the public, and deserve the greatest commendation and support.

Special Term, July, 1869.

Motion by the *relator* to compel the defendants to permit him to practice, as an attorney at law, in the courts held by them, &c.

Cardozo, J. It is very well settled in this state that a mandamus will not issue when there is another adequate remedy, but that the converse of that is not invariably true. Therefore, although except by that writ, a party may be remediless, that does not necessarily require that it should issue, but the application for it rests in the sound discretion of the court, which will grant or refuse it according as the issuing or withholding it will best promote the ends of jus-

tice. Guided by these simple rules, there can be no difficulty in disposing of this motion. It is plain that a mandamus should not issue.

The case fails to disclose any personal malevolence against the relator, but very clearly shows that Mr. Justice Dowling and his associate, Mr. Justice Kelly, have long set themselves against a system which has become so notorious that none of us can shut our eyes to its existence—a system which drives many reputable lawyers from courts which formerly were graced by the learning and character of such men as the Hoffmans, the Grahams, the Bradys, the Blunts, the Sandfords, and the O'Connors of our profession, and which should be honored by their legitimate successors, but who feel that the class against whom the action of the respondents is directed bring practice in the criminal courts into disrepute. Until this shameless conduct shall cease, and the disreputable practioners are driven from among us, I see no safety for those of the poorer class who are charged with crime before the inferior criminal tribunals, unless, as I trust will be done, the legislature shall interfere and provide for the employment by the county of some reputable lawyer to protect that unfortunate class of citizens, just as we now protect the rights of the rest of the people of the state, by employing a public prosecutor.

If, in efforts directed against a system and a class, to guard the practice of the profession against the unworthy, an innocent individual should occasionally suffer temporarily, it is to be deplored, but I should still hesitate very long before attempting to control, by mandamus, the action of magistrates who, even if it be conceded that they have exceeded the strict limit of their authority, are acting for the highest interests of the profession and the public, and deserve the greatest commendation and support. I think sound judicial discretion demands that, without passing upon the question of power in the court below, I should say that I will not interfere by this extraordinary remedy, believing that it

is better for the public that some temporary inconvenience and loss should be borne, even by a perfectly innocent individual, rather than that purposes so worthy should be at all thwarted by the action of this court; especially when I can say, as I do to this relator, that I have confidence that when on a proper occasion his rights are presented to the magistrates, they will be fully respected without the necessity of any interposition by this court.

That confidence I derive in this instance not only from the reputation of the magistrates, but from the spirit pervading the opposition to this motion, which displayed itself, among other things, in the kindly invitation by the respondent's counsel to the relator, throughout the case, to present a further affidavit in respect to the charge against him by the woman Hoch. The relator, under that invitation, did at a late stage of the proceedings make an affidavit much more explicit than that which he presented to Judge Dowling, and exhibiting the matter in a different light from that in which it first appeared; and I do not doubt that if he had originally respectfully presented that to the magistrate, it would have been regarded as satisfactory.

When I see such a disposition to afford opportunity to the relator to place himself aright, I think I cannot err in saying that he can safely trust the justice of the magistrates, and that to them he should be remitted.

These views would dispose of the present application, and therefore I shall not consider the question of the power claimed to exist in the court below, to suspend a lawyer from practice temporarily until the charges against him can be reported to this court for its action. But there are other conclusive reasons why this motion should be denied.

If it be conceded that the writ should go when an attorney is *debarred* by a subordinate court without authority, which is the most that can be claimed, still this application should not be granted, because a case of debarring is not made out. The most that can be pretended is that on a

single occasion—in Wood's case—the magistrate refused to hear the relator, and that subsequently they stated that they would not allow him to practice in that court. But this does not amount to a debarring of the relator, and since the Wood case, he has had no business in the court, and has made no attempt to appear and practice there.

If it be assumed that the court of special sessions is only a court of record for some purposes, and that all its orders need not be formally entered in the minutes of its proceedings before they are to be considered perfect, as to which it is not necessary to, and therefore I do not express any opinion, still something more than a mere statement by the magistrates, that they would not, in future, permit the relator to practice, made when the latter had no business before the court, demanding that he should be heard, should appear.

This writ should not issue for trifling reasons. A refusal to listen to the relator, in a single case, cannot alone be regarded as debarring him, and, therefore, would not justify it. It might be a mere ebullition of temper, from which no human being is exempt, engendered, perhaps, by some temporary circumstance or feeling, for which a writ of mandamus would be a very inappropriate remedy.

But the conclusive answer to the application is that the only act of the magistrates shown, related to but one case which was ended before this proceeding was initiated, and, therefore, his general rights not being affected, there is nothing pending in which the relator has any interest which can give him a standing in court to ask for a mandamus.

In the absence of any record evidence of an order debarring the relator, at least a determined and persistent refusal to hear him, upon proper demand, when business gave him a right to be heard, must be shown before the motion can be successful. In other words an illegal *debarment* must be shown, either by an order duly made and entered, or by *acts* (not mere words), which practically work debarment.

Even if the remarks attributed to the justice were made by him, I am not at liberty to say that when the relator duly, on some proper occasion when he has business entitling him to it, asks recognition of his license to practice, it will not be accorded to him.

I have no right to presume that a magistrate will not perform his duty, even though he may have hastily or thoughtlessly expressed himself as to what his course would be, at a time when he was not called upon to act judicially. Until some *act* towards putting into excution the determination which the respondents are alleged to have expressed, to exclude the relator from practice, has been done, I must presume that none such will occur; and, if not, a mandamus should not go to oblige them to retract language which they may have uttered.

Until dereliction from duty on the part of a magistrate clearly and positively appears by something more solemn than mere words, which may be spoken to-day and disregarded to-morrow—something more practical than a mere declaration of an intent as to the future, which may be formed now, and changed before the time to put it into execution arrives—something, in respect to a subject like the present, at least like, for instance, as I have already said, a determination to exclude the relator from practice, exhibited either by an order duly entered, or by persistent refusals in cases where the relator was retained, and appeared and claimed his rights, or by some *act* of the justice manifesting such a determination. I think no case for this extraordinary remedy is made. Motion denied.

N. Y. SUPERIOR COURT.

CHARLES BATCHELOR, plaintiff and appellant, agt. THE ALBANY CITY INSURANCE COMPANY, defendant and respondent.

Where on the pleadings and proofs of loss submitted by the plaintiff, consisting of one hundred and forty-five items of goods consumed by fire, of the alleged aggregate value of $11,127.24, and of forty-nine items of goods saved from the fire but damaged to the extent of $263, a *reference*, of the action on motion, was properly granted.

Such an account is an essential element in the cause of action, and forms a part of the basis of the action; for until it is rendered no cause of action exists, and when rendered it limits and controls the recovery.

And where it is found and decided by the special term, that the account in question is a long account within the meaning of § 271 of the Code; that no difficult questions of law are involved, and the allegations of the answer being insufficient to raise an issue of fraud, the order of reference appealed from should not be disturbed.

The rule laid down in *Whittaker* agt. *Deyfosse* (7 *Bosw.*, 678), authorizing a reference in actions involving the examination of a long account, approved and followed—which is substantially:

That it is sufficient if it appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first named issue at all; that whether the whole of the issues shall be referred, or the taking of the account merely; and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court at special term, to be governed by the particular circumstances of each case.

Also, if there is any evidence laid before the court below, that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by the counter affidavits, then the determination of the court below must be held final and conclusive.

General Term, May, 1869.

Before BARBOUR, *Ch. J.*, FITHIAN *and* FREEDMAN, *Justices*

THIS is an appeal from an order made at special term by Justice JONES, referring the issues in the action to a referee to hear and determine the same, for the reason that the trial of the action involves the examination of a long account within the meaning of § 271 of the Code. The opinion given at special term is as follows:

JONES, J. One of the questions arising on this motion, and indeed the main one, is—do a large number of items of goods destroyed or injured by a fire contained in an account required by the policy to be furnished by the assured as a condition precedent to the maintenance of an action on the policy, constitute, within the meaning of the law authorizing a compulsory reference, a long account against the insurance company, which has insured a party against loss of, and damage to such goods?

Before proceeding to discuss this question, I may premise that there are several cases, and among them the case of *Freeman* agt. *The Atlantic Mutual Insurance Company* (13 *Abb. Rep.*, 124), the reasoning and dicta in which tend to a negative answer of the question; but in none of the cases is the question distinctly met and decided.

Indeed, after a review of all the cases, I have come to the same conclusion to which the late learned and experienced chief justice of this court came in the case of *McLean* agt. *East River Insurance Company* (8 *Bosw. Rep.*, 700), where after a similar review, he concludes that what is meant by the terms "long account" has never been clearly determined, and without himself attempting to determine it, denies the motion for a reference on the ground that a defence of fraud, which ought to be tried by a jury, was interposed,

Neither shall I attempt to determine it, except so far as is necessary to enable me to solve the above inquiry.

The agreement of insurance is substantially, that the insurers will pay to the insured the reasonable value of such property as shall be destroyed, and as to such as shall be injured only, the difference between its value as injured and its value as uninjured. Upon a loss occurring the insurer becomes indebted to the assured in the amount of such value, and such difference. I am unable to perceive why such an indebtedness does not constitute an account as well as an indebtedness for the value of goods sold and delivered, when no price has been agreed on, or for the difference between

the contract price of goods and their market value, when goods are bargained and sold, but acceptance refused by the vendee, which latter indebtedness is conceded to constitute an account.

The mode in which the indebtedness for such value and difference arises cannot make any difference, whether it is by an express or implied agreement to pay, arising out of or made on a purchase, or an express agreement to pay in the event of a certain contingency happening.

This suit is not to recover damages as such for the breach of a contract; but is brought on the contract to recover a liquidated demand arising thereunder.

In some cases it is intimated that the account meant by the law is one which forms the basis of the action, and to recover which the action is brought.

I am inclined to think this view is not warranted by the statute. But let that pass.

The account here does form a part of the basis of the action, and the action is brought to recover the amount by it shown to be due.

The policy provides that upon a loss or damage being sustained the assured shall forthwith give notice thereof "to the company; and as soon thereafter as possible, deliver in a *particular account* of such loss or damage, signed with their own hands and verified by their oath or affirmation, and shall among other things declare on oath, what was the whole value of the subject insured, what was their interest therein, when and how the fire originated as far as they know or believe; and until such proof shall be furnished the loss shall not be deemed payable; and if there shall appear any fraud or false swearing the assured shall forfeit all claim under this policy." The policy also provides that losses shall be paid sixty days after the receipt of proper proof of loss.

Under these provisions the rendition of this particular account thus provided for becomes an essential element in the

cause of action. Until it is rendered no cause of action exists; and after it is rendered it limits and controls the recovery.

No reason presents itself to my mind, why, the particular account thus called for does not constitute an account within the meaning of the law.

Two cases have been brought to my notice which it is said, hold, that bills of goods comprising a large number of items sold and delivered at the same time, or a claim for several items of service, all performed at the same time does not constitute a long account. If this is settled law, it of course is as equally applicable to the present case, as to a bill of goods sold.

But I apprehend the decision of the court in those cases is too broadly stated. The two cases are *Swift* agt. *Wells* (2 *How. Rep.*, 79), and *Miller* agt. *Hooker* (2 *How. Rep.*, 171). On referring to them it will be seen that there was but a single transaction to be inquired into, and that the trial would not require a separate examination in the one case of each item of the bill of goods either as to the delivery or value thereof, or in the other of each item of service, as to the performance or value thereof.

The court therefore properly held that under such circumstances an examination of a long account was not involved. Although the general language ascribed by the reporter to the learned judges seems to go further; yet that general language is controlled by the facts of the case.

It is evident from these cases, that there are cases where a large number of items will not require the examination of a long account; but it is also evident that there are other cases where a large number of items, say, fifty, although of goods sold at the same time, will involve such examination, *e. g.*, when no price is agreed on, and the inquiry involves an examination into the value of each item by itself. If the sales were made on as many different days as there are items, it would not be questioned but that the examination of a

long account would be involved, although there was no dispute except as to the value. It is difficult to perceive how the fact of the sale of all the items at the same time, changes the character of the examination as to value.

I have arrived at the conclusion that the account in question is a long account, within the meaning of the law.

From an examination of the answer, I think no difficult questions of law are involved, nor are the allegations sufficient to raise an issue of fraud.

I think the motion should be granted.

Motion granted with $10 costs to the defendant, to abide the event, and cause referred to John J. Townsend, Esq., to hear and determine.

WEEKS and FORSTER, *attorneys and counsel for plaintiff, appellant.*

I. The trial of the issues will not require the examination of a long account or of any account in the sense in which that word is used in the section of the Code which authorizes a reference in certain cases.

To constitute an account in the sense of that section, there must be both debit and credit items. (5 *Bosw.*, 236; *Van Rensselaer* agt. *Jewett*, 6 *Hill*, 373; 6 *Wend.*, 503; 25 *Wend.*, 687; *Silmser* agt. *Redfield*, 19 *Wend.*, 21.)

In *McMaster* agt. *Booth* (4 *How.*, 428), Judge BARCULO defines an account to be "a computation or statement of debts and credits, arising out of personal property bought or sold, services rendered, materials furnished, and the use of property hired and returned." (*Keeler* agt. *Poughkeepsie, and S. P. P. R. Co.*, 10 *How.*, 11.) "A commutation of debts and credits between the parties," is necessary to constitute an account. The examination of numerous items of damage does not constitute an account between the parties within the meaning of that term. (*Dewey* agt. *Field*, 13

How., 438; *McCullough* agt. *Brodie*, 13 *How.*, 347; 18 *How.*, 213–311; 9 *Abb.*, 436.)

In *Allentown R. R. Co.* agt. *Johnston*, the late chief justice denied a motion for a reference on the ground that proof of over 300 items of stock subscriptions and their amounts, was not the examination of a long account under § 271. In *Jencks* agt. *The Mayor, &c.*, one of the riot claims, his Honor Justice McCunn held that though the plaintiff's claim embraced over 2,000 items covering twenty-five sheets of foolscap paper, each of which was contested, yet it was not a referable action. (*See also, Ross* agt. *The Mayor, &c.*, 2 *Abb. N. S.*, 266; *Swift* agt. *Wells*, 2 *How.*, 79; *Miller* agt. *Hooker*, 2 *How.*, 171; *Freeman* agt. *Atlantic Mut. Ins. Co.*, 13 *Abb.*, 124; *McLean* agt. *East River Ins. Co.*, 8 *Bosw.*, 700; *Sharp* agt. *The Mayor, &c.*, 18 *How.*, 213; *McCullough* agt. *Brodie*, 13 *How.*, 346.)

II. The requirement of the policy that the assured should deliver a particular account of such loss and damage signed and verified, &c., is the ordinary form of policies of insurance. The use of this phrase "particular account" does not bring the case within the § 271 of the Code, as the word "account" is used in the policy and in § 271 in two entirely distinct meanings which belong to it. If this ingenious reasoning of the opinion at special term is to prevail, all suits for loss on policies of insurance are subject to compulsory references, as in the case of insurance on a house or a ship, the policy, by the same words requires the assured to deliver a *particular account* of such loss, &c.

III. From the examination of the pleadings it is apparent that difficult questions of law are involved—the effect of the indorsement on the policy, "loss, if any, payable to Charles Batchelor as owner," which plaintiff claims entitles him to recover in his own right under the authority of *Solmes* agt. *Rutgers Fire Ins. Co.* (8 *Bosw.*, 578), while defendants under authority of *Grosvenor* agt. *The Atlantic Fire Ins. Co.* (17 *N. Y.*, 391), claim that they are discharged from all liabili-

ty; also the questions of the sufficiency of the proof; the conformity to the various requirements of the policy; indeed, from the pleadings it is not apparent that there is likely to be any very extensive examination even of the many items of plaintiff's damage, but numerous and difficult questions of law will evidently arise. There is no affidavit that the examination of any account is involved in the issues. (*Dedrick's Admrs.* agt. *Richly*, 19 *Wend.*, 108; *Cameron* agt. *Freeman*, 10 *Abb.*, 334; *Graham* agt. *Golding*, 7 *How.*, 260.)

IV. It would appear that the judge below overlooked the separate defense contained in the fifth clause of the answer, which clearly alleges falsehood in the policy and in the proofs of loss, which is certainly fraud.

V. The plaintiff is entitled to have these issues tried by a jury, and these questions of law decided by the judge presiding at such jury trial, and the judge below had no power to order a compulsory reference against plaintiffs opposition. The order should therefore be reversed, with costs. (*Dickenson* agt. *Mitchell*, 19 *Abb.*, 286; *Harris* agt. *Mead*, 16 *Abb.*, 257; *Goodyear* agt. *Brooks*, 4 *Robt.*, 682.)

BARNEY, BUTLER & PARSONS, *attorneys and counsel for defendants, respondents.*

I. It has been held in this class of cases that such an order is not appealable. The decision of such a motion rests in the discretion of the judge at special term. (INGRAHAM, J., *Ubsdell* agt. *Root*, 1 *Hilton*, 173, *general term; citing*, *Gray* agt. *Fox*, 1 *Code Rep. N. S.*, 334; *Bryan* agt. *Brennon*, 7 *How. P. R.*, 359; *Dean* agt. *Empire State Mut. Ins. Co.*, 9 *id.*, 69; *Smith* agt. *Dodd*, 3 *E. D. Smith*, 348. *See also*, *Sands* agt. *Harvey*, 19 *Abb.*, 248; *Hatch* agt. *Wolf*, 30 *How. P. R.*, 65; *McLean* agt. *The East River Ins. Co.*, 10 *Bosw.*, 701.)

II. On the merits of the motion it seems difficult to add anything to the well-considered and elaborate opinion of the learned judge who decided the motion at special term; but we remark

1. It will not be disputed that this is an action arising on contract;

2. That the trial of the issues of fact will require the examination of a long account or list of items, and as to the value of each item;

3. That the investigation will not require the decision of any difficult questions of law.

III. There appears to be but two generic issues involved in the pleadings; all other questions appear to be collateral to those.

1. As to the real ownership of the property claimed to be covered by the policy.

2. The question as to the amount and value of the property lost.

IV. Those issues depend upon questions of fact; there are no difficult questions of law involved; and the principal inquiry of fact evidently is as to the loss and value of numerous items of merchandise; and the defendants have a right to extend the inquiry as to value to every item claimed to be lost or damaged.

1. The judge at special term determined the question as to whether a long account was involved, and the appellate court will not review such a decision. (*Hatch* agt. *Wolf*, 30 *How.*, 69, *and cases cited*; *see also, cases cited under first point.*)

V. There is a wide difference between the Revised Statutes and the Code in respect to references. By the former only cases "*founded on contract,*" could be referred (2 *R. S., vol.* 2, *p.* 480, 3*d. ed*). Under the Code any action may be referred if the "trial of an issue of fact require the examination of a long account on either side." (*Code*, § 271.)

1. Even where the action or defense is founded on a *fraud* it may be referred. (*Sheldon* agt. *Wood*, 3 *Sand.*, 739; *McMahon* agt. *Allen*, 10 *How.*, 384.)

2. In the case of *Dean* agt. *The Empire State Mutual Ins. Co.* (9 *How.*, 69), where the answer distinctly set up fraud on the part of the plaintiff, by which the insurance was claimed to be void; the Albany general term, WATSON, WRIGHT and HARRIS, J.J., held, that as the investigation of a long account was involved, the case was referable, and,

3. Held, further, that in such a case the order at special term was not appealable.

VI. This action was brought on a contract. By the terms of that contract it is expressly provided that if the insured shall do or neglect to do certain things, the contract is violated and becomes void. Now, to aver the doing or neglect to do those things as is done in the answer, amounts in law simply to an averment of a breach of the contract. Fraud is not laid as a defense independent of the contract; it does not create the defense, that grows out of the contract; that the acts and omissions charged might amount to a fraud if so prosecuted, does not affect the question here.

1. The case of *McLean* agt. *The East River Ins. Co.* (10 *Bosw.*, 700), chiefly relied upon by plaintiff's counsel at special term, seems to be hardly authority here for this case.

a. It was a special term case.

b. It does not show what facts the defense was based upon, but merely says the defense was fraud.

c. It is based evidently upon theories prevailing before the Code; the principal case it quotes being in 25 *Wend.*; and,

2. It distinctly holds that such orders are discretionary, and not appealable.

VII. The appeal should be dismissed, or the order made at special term should be affirmed.

By the court, FREEDMAN, J. The appellant insists that this

is not a case in which a reference can be ordered against his objection. It is indeed strange to find that, notwithstanding the books are full of cases in which the question of the power of the court to order a compulsory reference has been discussed, and an attempt made to solve and settle it, it has never, either before or since the Code, been clearly and distinctly determined what constitutes a long account within the meaning of the law. A review of the adjudged cases usually cited upon this point, as well as the history of legislation upon the same subject since the first publication of the Revised Statutes, will be found highly interesting. I shall omit, however, to discuss the question in its constitutional aspect, as this point has neither been argued nor raised in the case under consideration. At the time of the publication of the Revised Statutes in 1829, section 39 of the statute, authorizing a reference in certain cases, read as follows:

"SEC. 39. Whenever a cause shall be at issue in any court of record, and it shall appear that the trial of the same will require the examination of a long account, on either side, such court may, on the application of either party, or without such application, order such cause to be referred to three impartial and competent persons."

The next section of the same statute provided for the appointment of referees, as follows:

"SEC. 40. If the parties agree on three persons as referees, such persons shall be appointed by the court; if they disagree, each party shall be entitled to name one, and the court shall appoint the persons so nominated, if they are free from all exceptions, and such other person as the court shall designate."

Section 46 prescribed that all the referees must meet together and hear all the proofs and allegations of the parties together, but a report of any two of them shall be valid.

By chapter 499 of laws of 1836 it was enacted that in any cause which may be referred to referees, it shall be the

duty of the court or judge ordering the reference, with the consent of the parties, to appoint such one person as sole referee therein as may be agreed on by said parties.

With the exception of this single change the statute remained unaltered as above until 1845; and so far from re-restricting the power of reference to matters of account alone, did not even confine it to actions arising *ex contractu.* In practice, however, the courts seem to have confined it to such actions. In *Thomas* agt. *Reab.* (6 *Wend.*, 503), decided in 1830, which was an action for the recovery of damages for breaches of various covenants, SUTHERLAND, J., held, "It may well be that the trial of a cause in an action of covenant may require the examination of a long account, but this is not such case."

Silmser agt. *Bedfield* (19 *Wend.*, 21), decided in 1837, decides simply that actions of tort are not referable, although it is true NELSON, Ch. J., gives it as his opinion that the statute only applies to cases where accounts, in the common acceptation of that term, may exist, and require examination.

The case of *Levy* agt. *The Brooklyn Fire Insurance Co.* (25 *Wend.*, 687), decided 1841, involved charges against the plaintiff: (1) That he had *fraudulently* caused the conflagration by which the property insured was injured, and (2) that in making up his statement of loss he had *fraudulently* over-estimated the amount of his loss; and for these reasons the chief justice said that, *without attempting to lay down any general rule* as to the reference of actions on policies of insurance, he was of the opinion that in a case involving such serious charges a party was entitled to the benefit of a trial before a court and jury.

In *Van Rensselaer* agt. *Jewett* (6 *Hill*, 373), decided 1844, which was an action for the recovery of nine year's rent, BRONSON, J., vacated the order of reference upon the ground that the defendants rested their *entire* defense on the ground that they were *never* liable for *any* rent, and that for this

reason no account between the parties, in the ordinary acceptation of the term, was involved.

The foregoing cases, and a report consisting of less than three lines of the case of *Parker* agt. *Snell* (10 *Wend.*, 577), to the effect that the court refused to refer the cause, because there were but four items in the account, constitute the groundwork upon which the claim has since been founded, that not only must there be a long account, but that it must be a mutual account between the parties; although the fact, that the statute did not restrict the power of reference to actions arising *ex contractu*, was distinctly recognized by COWEN, J., in *Lee* agt. *Tillotson* (24 *Wend.*, 338), decided 1840.

By chapter 163 of laws of 1845 the statute was changed, however, so as to apply only to "*causes founded upon contract,*" in which the trial, *or the assessment of damages*, will require the examination of a long account on either side. After the statute had been thus amended, but before the passage of the Code, the following two cases were decided, without reference, however, to the change introduced by the act of 1845, to wit: *Swift* agt. *Wells* (2 *How.*, 79), and *Miller* agt. *Hooker* (2 *How.*, 171). In the first-named of said cases, which is constantly cited in support of the theory therein advanced by BRONSON, Ch. J., that one bill of goods, containing fifty different items, delivered at the same time, is in fact but one item, the *gross* amount of the bill was agreed upon at the time of sale, the defendant had no set-off of any kind, and the only question raised was as to payment; and in the second case, it was held, upon the authority of the preceding case, simply that an action founded upon *one* bill of lading containing eleven items did not require the examination of a long account.

Section 226 of the Code as passed in 1848, and section 271 of the amendatory act of 1849, conferred authority upon the court to direct a compulsory reference in *any* case, among others, where the trial shall require the examination

of a long account on either side, and this power the courts have retained ever since. It will be seen that section 271 of the Code is again made broader in its terms than the provisions of the Revised Statutes, as amended in 1845. The latter provided for the appointment of referees in actions founded on contract only, while the Code authorizes a reference in *all actions* whatever involving the examination of a long account, and it has consequently been held by this court, in *Sheldon* agt. *Wood* (3 *Sandf.*, 739), with the concurrence of the entire court, that the court has power to order a reference in actions sounding in tort, where the trial of the issues of fact does require the examination of a long account.

The cases under the Code, which, upon a mere inspection, may appear to have been differently decided, will be found on careful examination to contain peculiar features and to rest upon peculiar facts, and that the question actually decided in them is to the effect only, and goes no further than that the examination of a long account within the meaning of section 271 is not involved therein, but that they do not determine what is such account. They are, therefore, not in conflict with the decision of *Sheldon* agt. *Wood*, *supra*.

In the same manner, it will be found that in several cases arising on contract, a reference has been refused, either because the account involved therein was not sufficiently long to warrant a reference, or because the examination of the account was not directly involved therein; but this class of cases also fails to establish a rule by which it could be determined what does constitute a long account, and according to which a decision of the court below upon this point could be reviewed at the general term.

The most important cases in which a reference has been denied are:

McMaster agt. *Booth* (4 *How.*, 428), decided in 1850. This case simply decides that an action of negligence cannot be referred, notwithstanding BARCULO, J., in making the de-

cision, adopts as the basis for it the language of NELSON, Ch. J., in *Silmser* agt. *Redfield, supra.*

Draper agt. *Day* (11 *How.*, 439), that an action to set aside an assignment for the benefit of creditors, on the ground of fraud, is not referable.

Dewey agt. *Field* (13 *How.*, 437), was an action against the sheriff for the recovery of damages for a false return to an execution.

McCullough agt. *Brodie* (13 *How.*, 347; 6 *Duer.*, 659), was an action for damages for false representations.

Sharp agt. *The Mayor, &c., of New York* (18 *How.*, 213), affirmed on appeal (31 *Barb.*, 578), was an action for damages for a misrepresentation, and the affidavit upon which the order of reference was granted was clearly insufficient, for the reason that it merely recited that the trial of the action would occupy a *long time*, and that a number of separate and distinct *facts* would have to be proved by a large number of witnesses.

The case of *Ross* agt. *The Mayor, &c.* (33 *How.*, 164), decides only that in an action brought to recover damages not arising out of contract, a reference cannot be ordered, even though the items of damage, which are to be examined, be ever so numerous.

In *Stevenson* agt. *Buxton* (37 *Barb.*, 13; 15 *Abb.*, 352), it was held that in an action for specific performance, where the fact that the defendant never had title, and was not and never had been able to specifically perform, is set up in the answer, and is proved on the trial at special term, a compulsory reference cannot be ordered to assess the damages, but the case should be sent to the circuit for trial.

In *Dickenson* agt. *Mitchell* (19 *Abb.*, 286), five items in plaintiff's bill of particulars were held not to be sufficient to constitute a long account.

Harris agt. *Mead* (16 *Abb.*, 257), was an action for plumbing-work. Substantially there were but two items, and five

items of extras of trifling amount, with one exception. The case simply held it not to be "a case for a reference."

The case of *Goodyear* agt. *Brooks* (4 *Robt.*, 682), turns upon the peculiar issues raised by the pleadings.

In *Cameron* agt. *Freeman* (18 *How.*, 310), it was held, at special term, that a reference against the will of the parties cannot be ordered, unless the issues in the action involve directly, and not merely incidentally, the examination of a long account. Several other similar cases may be found, which hold, without denying the power of the court, that it is improper to refer a case, where it may become only collaterally important to examine into a long account, but these I cannot stop to consider.

In the following cases among others a reference was ordered upon the ground that the examination of a long account was involved.

In *Masterson* agt. *Howell* (10 *Abb.*, 118), it was held, by HILTON, J., that an action to recover compensation for indorsing, for defendant's accommodation, notes exceeding twenty in number, is properly referable as requiring the examination of a long account.

In *Jackson* agt. *De Forrest* (14 *How.*, 81), a receiver was appointed and reference ordered upon the court's own motion to determine the whole issue.

In *Atocha* agt. *Garcia* (15 *Abb.*, 303), being an action to recover the value of board and lodging, MONELL, J., ordered a reference, notwithstanding the complaint contained allegations of fraud, which constituted a ground of arrest, and the defendant had been arrested thereon.

In *Hatch* agt. *Wolf* (30 *How.*, 65), which was an action to recover damages for a breach of covenant to keep premises in good and tenantable repair, the court of common pleas, at general term, upheld the order of reference.

DALY, F. J. in delivering the opinion of the court, held: That the order directing a reference upon the ground that the action required the examination of a long account, is not

an order affecting the merits, or which involves a substantial right, and is not appealable (*citing Dean* agt. *Empire Mut. Ins. Co.*, 9 *How.*, 69; *Bryan* agt. *Brennan*, 7 *How.*, 359; *Ubsdell* agt. *Root*, 7 *Hilt.*, 173); and if the action is one, in which a reference *may* be ordered, the order of the judge at the special term, whether the examination of a long account is or is not involved, is not one which the court will reverse on appeal. (*Citing Smith* agt. *Dodd*, 3 *E. D. Smith*, 348; *Kennedy* agt. *Hilton*, 1 *Hilton*, 546.)

In *Mills* agt. *Thursby* (11 *How.*, 113, *No.* 1), a general reference was ordered, although the examination of an account formed only a principal part of the issue. MITCHELL, J., held that, although the question of partnership or no partnership, alone, is a proper one to be decided by a jury; yet where it is so connected with the accounts of the firm as to require an examination of them, the cause should be referred.

That an action upon a policy of insurance may be referred, if it involves the examination of a long account, has been distinctly held in *Samble* agt. *The Mechanics' Fire Insurance Company* (1 *Hall*, 560).

In *Lewis* agt. *The Irving Fire Insurance Company*, and *Same* agt. *The Fulton Fire Insurance Company* (15 *Abb.*, 303, *note*), SCRUGHAM, J., granted the motions to refer, although the answer not only denied that the plaintiffs lost by the fire the goods claimed to have been lost, but charged fraud upon the plaintiffs in making claim for more goods than they lost, &c.

In *Dean and wife* agt. *The Empire State Mutual Insurance Company* (9 *How.*, 69), being an action upon two policies of insurance, executed by the defendants to Mrs. Dean, it was held by WATSON, WRIGHT and HARRIS, J. J., that, although the answer contained not only a denial of the value of the property, and of Mrs. Dean's ownership, but also an averment that part of the property belonged to Noah S. Dean, and that he had made, in the application for insurance, false

and fraudulent statements, which rendered the policies void, the court, at special term, having decided, however, that the action involved the examination of a long account, it was referable, and that the decision of the special term ought not to be reviewed upon appeal.

Finally, it should not be overlooked that several sections of the Code refer to different kinds of account. Section 158, in prescribing the manner of pleading an account, refers to an account and a "further account" generally. Section 95, in prescribing that, in an action brought to recover a balance of an account, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, expressly limits the operation of the section to "mutual, open and current accounts, where there have been *reciprocal* demands between the parties;" while section 271 applies to any kind of an account which may exist on either side, provided it is a long one. The cases of *Peck* agt. *United States and Liverpool Mail Steamship Co.* (5 *Bosw.*, 226), *Green* agt. *Ames* (14 *N. Y.*, 225), and *Hallock* agt. *Losee* (1 *Sandf.*, 220), have reference only to the account defined by section 95.

Therefore, in view of the fact that a review of all the cases bearing upon the point under consideration and a comparison of the decisions therein made with the facts of each case, discloses not only the inexpediency, but the almost utter impossibility of supplying the want of a statutory definition of the term "long account on either side," by a judicial construction to be followed in all future cases, I shall not attempt to determine the meaning of these words, but will content myself to decide the case under consideration in accordance with the rule laid down in *Whittaker* agt. *Desfosse* (7 *Bosw.*, 678), by five of the judges of this court, sitting in general term. In this case the language of Justice EDMONDS, in *Gray* agt. *Fox* (1 *Code R., N. S.*, 334), was criticised as an extreme view of one side of the question, and the remark of Justice DEAN, in *Keeler* agt. *The Pough-*

keepsie Plank Road Co. (10 *How.*, 11), as an unwarranted limitation of the power to refer on the other hand, and held that it is sufficient if it appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first-named issue at all; that whether the whole of the issues shall be referred, or the taking of the account merely, and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court, at the special or trial term, to be governed by the particular circumstances of each case; and it was consequently further held in the last-named case, that if there is any evidence laid before the court below, that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by counter affidavits, then the determination of the court below must be held final and conclusive, and this is the meaning and intent of the cases.

In the present case the motion for a reference was made and heard on the pleadings, and proofs of loss submitted by the plaintiff. The proofs of loss consist of one hundred and forty-five items of goods consumed by fire, of the alleged aggregate value of eleven thousand one hundred and twenty-seven dollars and twenty-four cents, and of forty-nine items of goods saved from the fire, but damaged to the extent of two hundred and sixty-three dollars. This particular account of such loss and damage, the plaintiff was, by the terms of his policy, bound to render to the company, and the policy provided further that the amount of the loss or damage shall be paid sixty days after the receipt of said account. This particular account, therefore, as has been truly said by the learned justice who ordered the reference, is an essential element in the cause of action, and forms a part of the basis of the action; for, until it is rendered no cause of action exists, and, when rendered, it limits and controls the recovery; and the said justice, upon the proofs before him,

having found and decided that the account in question is a long account, within the meaning of section 271, that no difficult questions of law are involved, and the allegations of the answer being insufficient to raise an issue of fraud, the order appealed from should not be disturbed. I will conclude by stating that I did not fail to examine the cases of *McLean* agt. *The East River Ins. Co.* (8 *Bosw.*, 700), and *Freeman* agt. *The Atlantic Ins. Co.* (13 *Abb.*, 124), but that my views have not been changed thereby. In the first-named of these cases, a reference was refused at the special term on the sole ground that part of the defense was fraud on the part of the insured; and I must assume that the fraud was charged and averred in such form as to compel a determination of the question on the trial upon the evidence given in support of it. In the case last referred to the court, at general term, it seems, did not deny the power of the justice at special term to order a reference in that particular case; but simply held, "As the whole defense in this case rests upon the alleged fraud of the plaintiff, in not putting the goods on board, and also that the vessel was intentionally wrecked, and as both issues involved directly a charge of fraud, *we do not think the case should have been referred;* such questions are *properly* to be tried by a jury."

The order appealed from should be affirmed with ten dollars costs,

BARBOUR, Ch. J.—I concur.

FITHIAN, J.—I concur.

SUPREME COURT.

GEORGE N. MILLS agt. DIANA C. LEWIS.

An instrument cannot be *reformed* on the ground of *mistake* by one of the parties to it. It must be a case of *mutual mistake* by both parties, where there is no question of fraud involved, to authorize a reformation of the alleged mistake.

Thus, where the plaintiff specially authorized his agent to sell a colt, which belonged to the plaintiff, to the defendant, and to take in payment therefor, a mortgage which the defendant owned, provided the defendant would guarantee the *payment* of the mortgage; and on negotiation between the agent and the defendant, the latter refused to guarantee the payment of the mortgage, but would guarantee its *collection* only, which the agent consented to take; and on drawing the assignment of the mortgage by the scrivener of the defendant, instead of drawing it with a guarantee of collection, he drew it with a guarantee of *payment*, and the defendant executed it without reading it, and it having been delivered to the plaintiff without notice of any mistake having occurred on the part of the defendant, and being such a guarantee as he required, he thereupon delivered to the defendant the colt.

Held, in an action on the guarantee by the plaintiff, that this not being a case of mutual mistake, and the plaintiff being free from any imputation of fraud, and the mistake happening through the scrivener of the defendant, the result was that there never was a meeting of the minds of the parties as to the sale; and it was competent for the defendant to return the colt and rescind the contract, which was the only relief to which she was entitled; and the defendant not having done this, judgment must be ordered for the plaintiff for the amount due upon the mortgage and interest.

Jefferson Special Term, March, 1869.

THIS action was brought on defendant's assignment and guarantee of a real estate mortgage, executed by one Asel Spicer and wife to defendant, to secure a portion of the purchase price of certain premises.

A bond was executed by Spicer and delivered by him, with the mortgage to the defendant. Her assignment and guarantee to the plaintiff were in writing and in the following words:

"For and in consideration of the sum of sixty dollars to me in hand paid, I hereby sell and transfer the within mortgage to George N. Mills of Hounsfield, and guarantee the payment of the same with interest."

There was no assignment or delivery to plaintiff of the accompanying bond nor proof given on the trial of its loss.

One Rufus W. Baldwin, the agent of the plaintiff, negotiated the sale of a horse in exchange for the mortgage under instructions from plaintiff, not to make the exchange, unless the defendant would guarantee the *payment* of the mortgage. This the defendant refused to do, but finally agreed with Baldwin to make the exchange and guarantee the *collection* of the mortgage. One O. H. Rundell, was employed to draw the assignment and guarantee of *collection*, but by mistake, Rundell drew a guarantee of *payment*, instead of collection of the mortgage, and the defendant executed the same and delivered the mortgage to the agent Baldwin.

The mistake was known to Baldwin at the time of its delivery, but the defendant never knew of the error until after the mortgage had fallen due and the commencement of this action, but supposed the guarantee to be one of *collection* instead of payment as was her agreement with said Baldwin.

The defendant in her answer, alleged the mistake and prayed the reformation of the guarantee.

This action was tried before Justice MULLIN, at Special Term, in March, 1869.

L. J. DORWIN, *for plaintiff.*

I. The action is upon the guarantee of the payment of the mortgage. The mortgage not being paid, an action lies—It is immaterial whether an action could be maintained upon the mortgage, or whether there was any bond or not.

II. There is no pretence of any fraud.

III. A mistake to be available, must be mutual between the parties. The defendant claims a mistake, the plaintiff denies it. Proof must be made equivalent to an admission

by plaintiff. (*Story's Eq.*, §152—3,5,6; 26 *Wend.*, 186; 2 *J. Ch.*, 633; *id.*, 596; 1 *Paige*, 278).

There is no proof whatever of any mistake on the part of the plaintiff.

1. The assignment was drawn by the direction of defendant, in plaintiffs' absence, and executed and sent to plaintiff for his acceptance before he delivered the property.

2. The fact that the defendant did not read the assignment is no defense—she might have read the assignment when she signed it, and she is now estopped from controverting anything therein contained. (*Jackson* agt. *Croy*, 12 *John.* 428).

ANSON B. MOORE, *and*
JOHN C. MCCARTIN, *for defendant.*

I. This action is based upon a written assignment and guarantee of a *mortgage* merely. There is no proof of a delivery of the bond with the mortgage, and by the language of the assignment the bond was never transferred to the plaintiff. The court will not *infer* a delivery, or transfer of the bond, without positive proof; and clearly not where the very *assignment* and transfer by which title to the mortgage is claimed do not convey the bond.

The plaintiff is not entitled to recover in this action because,

1. The bond is the debt, and the mortgage is but an incident to it. (*Martin* agt. *Meulin*, 2 *Burr*, 960; *Green* agt. *Hunt*, 1 *Johns.*, 580; *Jackson* agt. *Blodget*, 5 *Cow.*, 202; *Jackson* agt. *Bronson*, 19 *Johns.*, 325; *Wilson* agt. *Troup*, 2 *Cow.*, 231; *Cooper* agt. *King*, 17 *Abb.*, 342).

2. There was no transfer of the bond, and hence there was no *transfer* to the plaintiff of any debt against the defendant by virtue of the mortgage. The transfer was of the mortgage only. (*Merritt* agt. *Bartholick*, 36 *N.Y. R.*, 44).

3. The transfer of the mortgage without the bond, which is the debt, is a nulity,and no interest is acquired by it. (36 *N.Y. R.*, 44; 4 *Johns.*, 41; 9 *Wend.*, 80; 5 *Johns., ch. R.*, 570).

II. The plaintiff authorized Baldwin to make the exchange of the horse for the mortgage, Baldwin was the *agent* of plaintiff in the transaction and the plaintiff is bound by his acts. Plaintiffs *secret* instructions to B. in relation to the kind of guarantee defendant should give, would not bind her, unless communicated to her by the agent Baldwin. No such communication was ever made to defendant.

III. Baldwin, the plaintiff's agent knew at the time of the execution of the assignment and delivery of the mortgage that the defendant intended to guarantee the *collection* of the mortgage and not its payment.

Knowing that defendant had executed a paper, she did not intend to give, and had refused to execute; and knowing the same had been executed through inadvertance and mistake; he retains the instrument and purposely deceived her, thereby perpertrating a *gross fraud* upon her. The *knowledge* of the agent was the *knowledge* of his *principal*—the fraud was in this case the act of the plaintiff. (*Jeffrey* agt. *Bigelow and Tracy*, 13 *Wend.*, 518; 15 *Johns. R*, 44; 21 *Wend.*, 279; 1 *Hill. R.*, 501; 17 *Barb.*, 171; 26 *Barb.*, 564.)

IV. Actual injustice has been done the defendant in this case, through inadvertance or mistake; and "where it is palpable that actual injustice has been done through *inadvertance* or mistake of counsel, although it arose from mistaken apprehension of the law, the *court* will feel bound to *restore* the party, if it can be done without prejudice to the rights of other parties," (*Levy* agt. *Joyce*, 1 *Bosw.*, 622; *Camerron* agt. *Irwin*, 5 *Hill.*, 272; *Leavitt* agt. *Palmer*, 3 *N. Y.*, 19).

MULLIN, J. The objection by the defendants counsel, that as the bond to which the mortgage was collateral was not assigned, the mortgage is of no validity, and the defendant cannot be made liable on a guarantee thereof, was not taken on the trial, and cannot be insisted on now. The plaintiff might perhaps have shown that the bond had been assigned or that there never in fact, was one executed. It is enough to know that he has had no opportunity to be heard and the objection must be disregarded.

There being no fraud on the part of the plaintiff or of Baldwin, and there being no motive which could induce the scrivener who drew the assignment and guarantee to practice a fraud on the defendant, I think the only ground for relief, if there is any, is on the ground of mistake inadvertance or surprise. I think upon the proofs before me, it is satisfactorily established that the defendant did not intend to execute a guarantee of payment, nor did she know at the time she executed the paper drawn by Mr. Rundell, that it was not a guarantee of collection. So far as the defendant is concerned therefore, a clear case of mistake is made out.

But it is well settled that the mistake of one of the parties to a contract is not enough to authorize the court to reform it; it must be the mutual mistake of both parties. (*Nevins* agt. *Dunlap*, 33 *N.Y.*, 676; *Botsford* agt. *McLean*, 42 *Barb.*, 455). A new trial was granted by the special term in this case, and on the second trial it was proved that the defendants perpetrated a gross fraud on the plaintiff, in reference to the notes sought to be reformed, and the notes were decreed to be reformed according to the prayer of the complaint, (*Same* agt. *Same*, 45 *Barb.*, 478; *Kent* agt. *Manchester*, 29 *Barb.*, 595; *Story's Eq.*, § 155, 160.)

The important question in this case then is, was there a mistake on the part of the plaintiff in reference to the kind of guarantee which the defendant was to give? or did he know when he received the assignment and guarantee that

it was not the instrument that the defendant had agreed and intended to give.

Personally, the plaintiff had no negotiation with the defendant concerning the trade. He had authorized his agent to exchange the colt for the mortgage with the defendant's guarantee of payment. It does not appear that Baldwin ever communicated to him the refusal of defendant to give the guarantee required or the offer to give a guarantee of collection only. When the guarantee of payment was handed him by Baldwin, he did not know of any intention on the part of the defendant to give a guarantee of collection. There was therefore, no knowledge on the part of the plaintiff of any mistake; on the other hand, the defendant had sent to him the guarantee he required, and it was in conformity with the bargain as he understood it to be, and intended it should be made.

Unless therefore, the knowledge of Baldwin, that the defendant did not mean to give a guarantee of payment, binds the plaintiff, there was no such mutual mistake as entitles the defendant to relief.

It is necessary, in order to determine this question, to ascertain precisely the relation which B. occupied to the parties in effecting the trade.

The plaintiff and B. are the only persons who speak as to the interview between them, when plaintiff informed B. of the terms on which he would sell the colt. We must look to their evidence for the powers, if any, given B. to act for plaintiff.

The plaintiff says: "I told B, I would trade horse for $75, and I would take the mortgage, if he would make it $75, and Mrs. Lewis should guarantee payment instead of collection; that I would take it on no other condition; I would not be bothered collecting it; when it came due, I would call on her. He (B.) said, he thought he could make the trade." On cross examination he says: "I told B. how I would trade, I did not direct him to carry the proposition

to any one. He said he thought he could make the trade."

Baldwin testifies: "I was acting for both parties in making the trade, I made trade for mortgage; I bought mortgage for Mills, had talk with plaintiff before going to see defendant about this trade; plaintiff first suggested the trade to me; plaintiffs proposition was for me to sell colt to them (meaning defendants family); as they had no horse, and he would take the mortgage if she would guarantee it; I told him I did not think mortgage good for anything. He said he did not care, he would take it if she would gaurantee it and pay the difference. I told him I would see her and I did. Think plaintiff talked of guarantee of payment or collection but cannot tell which he said. Talked generally about guaranteeing. Plaintiff talked of guaranteeing the mortgage, sometimes the payment—sometimes the collection, plaintiff wanted me to aid him in selling the horse."

Baldwin's recollections as to the kind of guarantee plaintiff required, is not clear—plaintiff swears positively, he told B. he must have a guarantee of payment, and if B's opinion that the mortgage was good for nothing was correct, the probability is, that plaintiff required, as he swears he did, a guarantee of payment. It would be difficult to find a reason for his taking such a mortgage with a guarantee of collection. For these reasons I have found as matter of fact that plaintiff instructed B. that he would not take the mortgage, unless payment was guaranteed.

What under these circumstances and upon this evidence was the power conferred by plaintiff on Baldwin?

The plaintiff had fixed the price at either $75 or $85 and it is not certain which nor is it material. He had agreed to accept the morgage and had designated the guarantee he must have. He made it a condition of the trade, that he should have the use of the horse for a while after the completion of the trade.

Baldwin, if he is to be treated as agent of the plaintiff, was acting under special instructions—authorized to complete a sale upon terms specifically defined. All that B. had to do was to carry the plaintiff's proposition to the defendant and if accepted, the sale was complete. If not accepted, then the power of B. to sell the horse was terminated. There was no discretion whatever, vested in B.

When therefore, the defendant refused to give the guarantee of payment, the power of the agent terminated. If the defendant proposed new and different terms, it was the duty of the agent to submit those terms to the plaintiff for acceptance or rejection, and until accepted there could be no bargain made that bound the plaintiff. It would seem from the evidence of the witnesses that B. did not inform the defendant that she must give a guarantee of payment, or plaintiff would not trade, on the contrary, it would seem to have been left discretionary with the defendant to give whichever form of guarantee she should deem proper, and she elected to give one of collection and so informed the agent. He was present when the instructions were given for drawing the guarantee, and when it was drawn and signed he received it as, and supposed it to be, a guarantee of collection.

B. was a special agent acting under specific instructions, and it was the duty of the defendant to ascertain the nature and extent of the authority, and she dealt with him therefore at the peril of having the agents contract repudiated if it turned out that he had exceeded his powers. (*Story on Agency*, § 126, 127, *and notes*; *Paley on Agency*, 202 *and notes*; *Batty* agt. *Carswell*, 2 *J. R.*, 48; *Nixon* agt. *Palmer*, 4 *Sold.*, 398; *Scott* agt. *McGrath*, 7 *Barb.*, 53).

I do not think the plaintiff would have been bound by the acceptance by the agent (if B. can be considered as such) of a guarantee of collection if one had been given to him, unless the principal had accepted it when offered to him. The guarantee offered, was the one he required—he

accepted it without notice of any mistake on the part of the defendant, and there clearly was none on his own part. This not being a case of mutual mistake, and the plaintiff being free from any imputation of fraud, the question is, is the defendant entitled to any relief, and if any, to what kind and measure of relief is she entitled.

That she has executed an obligation that she did not intend to execute is established. But it was through the mistake of her agent, the scrivner, that the wrong was done her; the plaintiff got only what he required to be given and B. was not authorized to accept anything else. The result then is, that there never was a meeting of the minds of the parties as to the sale, and it was competent for the defendant to return the colt and rescind the contract, and this was, I apprehend, the only relief to which she is entitled.

There is no ground laid by the proofs for reforming the instrument, and the defendant has not done that which alone can entitle her to rescind the contract. She cannot retain the horse and defeat a recovery, on the ground of mistake, on an obligation made and delivered by herself in payment of the horse, and which is the indentical obligation that plaintiff required to be delivered to him.

I therefore, order judgment for the plaintiff for the amount remaining due on the mortgage and interest, but not until the guarantee is properly stamped, which the plaintiff is permitted to do.

SUPREME COURT.

The People, *ex rel.*, The Town of Schaghticoke agt. The Troy and Boston Railroad Company.

A *railroad company*, organized under the general statute of the state (1850), is required, in *crossing a highway*, to restore the highway thus crossed to its former state, or to such state as not unnecessarily to impair its usefulness.

And where it becomes necessary, in crossing a highway, that a *bridge* should be built over the railroad to restore the highway to its usefulness, the railroad company are bound to build the bridge and *continue it in repair*, as long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise.

The mere *abandonment of the railroad and the removal of its track, and its entire disuse* is not enough to deprive the railroad company of the privileges of its franchise or to absolve it from maintaining and keeping in repair such bridge.

A *mandamus* is the proper remedy to compel the railroad company to keep and maintain the bridge in proper repair.

Albany Special Term, June, 1869.

The Albany and Northern railroad company formerly built and used and occupied a portion of its road across and under the public highway, leading from the village of Schaghticoke to the south in said town of Schaghticoke.

The railroad on its surface was forty-five feet below the surface of the highway at the place of said crossing, and the company built a bridge across said railroad track, for the use of the travelling public.

The title to the railroad was subsequently transferred to the Albany and Vermont railroad company, and afterwards the Troy and Boston railroad company, became the assignee of all the right title and interest before held by the Albany and Vermont railroad company. The track of the road has been demolished and disused for railroad purposes, since September, 1860. The bridge was kept up until about one year ago, when it became dangerous and was taken down and removed by the superintendent of the Troy and Boston

railroad company as is claimed by this corporation, without any authority from its officers.

The relator now moves for an order that a peremptory mandamus issue against the company, commanding them to rebuild, maintain and keep in repair the bridge in question.

A. J. PARKER *and* FRANCIS RISING, *for relator.*
W. A. BEACH, *contra.*

MILLER, J. The Albany Northern Railroad Company, was organized under the general railroad act of 1850, (*chap.* 140). Section 24 of the act in question, provides that whenever a track of a railroad shall cross a highway, &c., such highway, &c., may be carried under or over the track as may be found most expedient. Authority is also conferred by section 28, subdivision 5 of said act "to construct their road across, along or upon" any highway, &c., "which the route of its road shall intersect or touch, but the company shall restore the" highway, &c., "thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. The twenty-fourth section referred to gives authority to cross the highway, either under or over the track, and makes provision for the taking of additional land in cases where a change of the line of the highway is necessary. While this section applies generally to cases where the road crosses a highway, either over or under the highway, it does not in my opinion prevent the application of the fifth subdivision of the 28th section to all such cases, as well as others, which are clearly embraced within the provisions of section 24. Section 28 confers directly upon railroad corporations certain powers with which is the power stated in the fifth subdivision to construct their road across a highway. The language in general makes no exception, and I think applies to any and

all cases where a railroad crosses a highway whether it be upon a grade or otherwise.

Assuming that this is a correct interpretation of the enactment cited in this respect and that it is applicable to the case at bar, the question arises as to the construction to be placed upon the language employed prescribing the duty of a railroad company, the obligation of restoring the highway to its former state or to such state as will not unnecessarily have impaired its usefulness.

In the case presented, it would have been difficult if not impossible, to restore the highway exactly to its former condition, but by the building of a bridge it could be used as formerly had been done and its usefulness continued unimpaired, so long as the bridge was kept in repair and maintained. The decay of the bridge or its demolition for any cause would necessarily impair and destroy its usefulness, and further reparation would be indispensible for the accomodation of the public.

The statute evidently intended, I think, something beyond a mere temporary restoration which would endure but for a season. It meant a permanent restoration, which would be continued as long as the highway existed and the corporation was allowed to enjoy the lawful exercise of its franchise.

It does not cancel the duty imposed, or answer the obligation incurred, to restore the bridge for a day, or a month, or a year, but it requires the company to place and to keep the bridge in such a condition as to render it permanently useful. If a mere nominal restoration was intended, then it would be sufficient if it endured for the briefest period of time, and thus the burden of supporting the bridge erected for the use of the company would be imposed upon the taxpayers of the town, who received no benefit and reaped no advantage whatever by its construction.

Clearly, this was not the intention of the legislature, and the language employed was not designed to make a distinction against the public and to impose upon them the

duty and burden of maintaining a bridge, the erection of which was rendered necessary for the accomodation of the company and which would furnish no greater facilities for the travelling community than the highway did as it previously existed. While the railroad act makes stringent pro visions for the protection of private property when infringed upon and for the erection and maintenance of fences, cattle guards and farm crossing, it does not follow that the omission to provide for the maintenance of a bridge erected over a crossing relieves them from the responsibility of keeping up the bridge in accordance with the spirit of the statute, and renders them merely responsible for private damages arising from their neglect.

The authorities to which we have been referred on this point merely holds that the statutes protect the company if they comply with the directions imposed (*25 Wend.*, 454; 27 *Barb.*, 520). A compliance is essential, and unless this is done according to a fair interpretation of the language of the statute and looking at the intention of the legislature the company cannot, I think, claim to be exonorated.

The obligation to keep the bridge in repair, is held in several authorities to be implied by the authority given for its erection (*See King* agt. *Inhabitants of Kent*, 13 *East*, 220; *Dygert* agt. *Schenck*, 23 *Wend.*, 446; *The People* agt. *Cooper* 6 *Hill.*, 516; *Follett* agt. *The People*, 2 *Kern.*, 268; *Ros. Cr. Ev. Phil. Ed.*, 1840, 297, 298).

It is a continuing condition co-extensive with the grant itself which applies so long as the company have the right to use and enjoy the franchise and until it is lawfully relieved from the duty imposed by the statute mere abandonment of the track and its disuse is not enough, for this of itself, does not deprive the corporation of a right to assert its former possession and a resumption of a full enjoyment of all the privileges conferred; the right to use is equivalent to the use and enjoyment of the privileges granted, and while it owns the franchise with such a right existing it

cannot relieve itself of the obligation which it imposed, and is bound to perform the condition upon which it was granted. The removal of the track is not in my opinion an act which deprives the coporation of the privileges conferred and the full benefit of its use if it chooses, at any time to enjoy them or discharge it from the duty assumed towards others by the acceptance of the grant upon the terms imposed.

The company cannot incur a forfeiture at its own pleasure and in disregard of the rights of others. (*See The People* agt. *The Albany and Vermont R. R. Co.*, 24 *N. Y.*, 261.

I think that the motion is properly made in the form in which it is now presented, and the right being clear and no other specific legal remedy existing, it is a proper case for a madamus.

Nor is it an objection to granting a writ of mandamus that a party is liable to indictment and may be punished criminally for omitting to do the act to compel the performance of which the writ is sought (10 *Wend.*, 395, 397).

A peremptory mandamus must therefore issue, but as the question involved is important if the respondent desires to appeal, there should be a stay of proceedings for that purpose.

COURT OF APPEALS.

THE COMMERCIAL BANK OF CLYDE, appellant agt. THE MARINE BANK, respondent.

A *bank* receiving from another bank, notes, bills, &c., for collection, obtains no better *title* to them or their proceeds, than the remitting bank had, unless it becomes a *purchaser for value, without notice of any defect of title.*

The receiving bank is not a purchaser for value, by reason merely of its having a balance against the remitting bank for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing upon the *proceeds* for balances at pleasure.

The distinction in reference to a change of title to such paper is this: If the receiving bank is at liberty, in pursuance of the general arrangement between it and the remitting bank, *to credit the paper on receiving it*, and does so, to form a fund upon which the remitting bank is entitled *to draw immediately*, then the ownership of the paper and its proceeds as between the banks, is in the *receiving bank*; but where the paper is transmitted to the receiving bank *for collection merely*, and is to be credited to the remitting bank *when received* by the receiving bank, then the title does not pass to the receiving bank.

January Term, 1867.

PARKER, J. The plaintiff is a corporation doing business at Clyde, in this state, and the defendant is also a corporation doing business at Milwaukee, Wisconsin.

In April, 1867, Miller, Powell & Co., drew a draft on one Crocker, of Milwaukee, for $411.96, payable at sixty days, to the order of the plaintiff, and delivered it for value to the plaintiff. The plaintiff indorsed and sent said draft to John R. Lee & Co., who were bankers at Buffalo, for collection, and on the 11th of April, Lee & Co., indorsed and sent it to the defendant for collection.

On the 14th of May, 1857, Lee & Co. failed, and have ever since been insolvent.

The defendant and Lee & Co. had each been, from about the 1st of April, 1856, to the 14th of May, 1857, the commercial and banking correspondents and agents of the

other, and during that time had done business, each for the other, in the collection of drafts and commercial paper, and otherwise. It was their usage and custom to receive and collect drafts and notes, and to credit, each to the other, the proceeds of such drafts and notes when collected, deducting therefrom the charges and expenses of collection. Accounts current were exchanged from time to time between them and settlements made in accordance with such custom and usage.

The draft in question was received by the defendant on the 13th, and accepted by Crocker on the 14th of April, 1857.

Between the 14th of April and the 14th of May, the defendant, in the usual course of business, sent to Lee & Co., for collection, a certificate of deposit, issued by the International Bank of Buffalo, for $200, and a check drawn on said bank for $63.25, both of which were collected by Lee & Co., and placed to the credit of defendant; and they also collected between those dates a draft, which had in like manner been previously sent them for collection, for $175, which was also placed to the defendant's credit. And between those dates the defendant had collected and placed to the credit of Lee & Co., paper forwarded by them, in the usual course of business, for collection, to the amount of $200.

On the 3d day of June, 1857, the defendant collected the said Crocker draft of the drawer, and credited the amount of such collection, less one per cent. charges (being $407.85), to Lee & Co. On the day before the payment of the draft, Lee & Co. were indebted to the defendants in the sum of $743.70, leaving a balance, after deducting the proceeds of the draft, of $65.85. On the 9th of June, defendant collected a draft—which it had received from Lee & Co., for collection, as usual—the net proceeds of which, amounting to $67.47, after paying a portion thereof which was claimed by a third party, was placed to the credit of Lee & Co. On

this latter day the plaintiff gave defendant notice of its claim to, and demanded payment of, the proceeds of the Crocker draft, and defendant refused to pay the proceeds, or any part thereof, to the plaintiff.

Evidence was given tending to show, that after the middle of March, the defendant did not intend to allow much balance in the hands of Lee & Co., beyond what paper defendant had from them about to mature, though, both before and after April 14th, paper was sent to them in order to supply a fund on which defendant might draw for such small amounts as were occasionally called from Buffalo; also that paper was sent and the prior balance allowed to remain after the 14th of April, on the faith of the Crocker draft (which defendant believed to belong to Lee & Co.) and the other paper, and for the other reason above stated.

Upon the trial, the plaintiff asked the court to charge the jury that, unless the defendant gave Lee & Co. some new credit, or made advances, or parted with some value, on the credit of the Crocker draft, the plaintiff was entitled to recover, which was refused. And the jury were instructed, that if the defendant had transmitted any paper to Lee & Co. between the 14th of April and the 14th of May, on the faith of the Crocker draft, *or* if it delayed drawing the amount due it, by reason of having this draft, the plaintiff was not entitled to recover; and that upon the evidence the defendant was entitled to a verdict: and thereupon the court directed a verdict for the defendant.

Without reference to the question whether this judgment could stand upon the decisions of the supreme court of the United States, it is clear that it is not supported by the decisions of the courts of this state.

It may be remarked that it is not so certain that the defendant transmited any paper to Lee & Co. for collection,on the credit of the draft in question, as to authorize the court to assume it as a fact against the consent of the plaintiff. But there is no pretence that paper to the whole amount of

the proceeds of the draft was so sent; and even if the fact were admitted that the paper claimed to have been so sent was sent upon the credit of the draft; and if, as matter of law, it be admitted that defendant had the right to retain, from the proceeds, an amount equal to the amount of paper so sent and collected, still the plaintiff was entitled to recover the difference between the amount of the proceeds of the draft and the amount of paper so sent and collected.

Under the decisions of this court, the defendant could not hold any portion of such proceeds to satisfy balances which it had suffered to lie in the hands of Lee & Co. on the credit of the draft.

This was very distinctly held in *McBride* agt. *The Farmers Bank*, (26 *U. S. R.*, 450). The doctrine of that case is, that a bank receiving from another. notes for collection, obtains no better title to them, or their proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title; and that it is not a purchaser for value, by reason of its having a balance against the remitting bank for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing upon the proceeds for balances at pleasure.

It is to be observed that the course of dealings between Lee & Co., and the defendant did not authorize either to draw upon the other for the amounts of the paper sent, until collected; the proceeds, after deducting the charges for collection were alone credited, and no notes or drafts ever entered into their accounts, until collected. There is then, no ground for saying that the draft in question ever belonged to the defendant. It was said in *McBride* agt. *The Farmer's Bank*, "according to the decisions of the courts of this state, Paul & Pritchard could have set up any defense to their notes, in the hands of the defendant, that existed in

their favor as against the Canal Bank, or the Farmers' and Mechanics' Bank; and the defendants had no title to the notes that enables them to retain the money they received thereon as against the true owner."

Precisely so in this case. Crocker could have set up any defense to the draft in the hands of defendant that existed in his favor as against Lee & Co. or the plaintiff, so that the defendant had no title to the draft that enables it to retain the money it received thereon against the true owner. Even as between the defendant and Lee & Co., no title to the draft ever passed to the defendant. If it had not been paid, and had gone to protest, there is nothing in the case which would have entitled the defendant to maintain an action upon it against Lee & Co.

If the defendant had been at liberty, in pursuance of the general arrangement between it and Lee & Co., to credit the draft on receiving it, and had done so, to form a fund upon which Lee & C. were entitled to draw immediately, as was the case in *Clark* agt. *The Merchants' Bank*, (2 *Coms.*, 380), then the defendant might, as against Lee & Co., have claimed ownership of the draft and of its proceeds. In that case this distinction is made the criterion. The court say: "The material question, as stated by the court below, is whether the bill in question was transmited (by the plaintiffs who were the owners) to Smith & Co. (their business correspondents) for collection merely, or was to be credited to the plaintiffs when received by the former, whether collected or not." The court below had held that it was not, by the course of dealings between the parties, to be credited until collected, while this court held that the proper inference from the facts proven was, that it was to be credited, when received. "The error of the learned judge, I apprehend," says Judge GARDINER, "consists in the assumption that nothing was credited to Clark & Co. (the plaintiffs), in the course of business, until collected. This inference is opposed to the testimony of the only witnesses who speak

as to the nature of the business and mode of transacting it, and to instructions of the plaintiffs in the letter of the 15th of May." And it was because of that error that the judgment of the court below, which gave the proceeds of the bill to the plaintiff, was held erroneous and reversed.

The case of *Scott* agt. *The Ocean Bank*, (23 *U. S. R.*, 289) is based upon the same distinction. These cases, I think, warrant the conclusion that the defendant, having acquired no title to the draft itself, cannot claim to hold, as against the true owner, any portion of the proceeds.

In regard to the case at bar, however, it is sufficient, and all that I am authorized by the court to say is, that the court below erred in assuming that the defendant had transmitted any paper to Lee & Co. on the credit of the draft and in holding that if defendant had delayed drawing the amount due it by reason of having this draft, the plaintiff was not entitled to recover.

The judgment of the supreme court must therefore be reversed, and a new trial ordered.

All concur in result.

SUPREME COURT.

PETER COYKENDALL, appellant agt. NATHAN P. EATON, respondent.

The duties of an *innkeeper*, as such, are due only to his guests.

To constitute one a guest, it is not necessary that he be at the inn *in person*. It is enough that his *property* be there in the charge of his wife, or servant, or agent who is there in his employment or as a member of his family:

But they must be there in such way that the law implies the property, while there, to be in *his possession*, and not in the possession of the person who is there with it as his bailee.

Where the owner of the property hires it out or lends the use of it, to the person who takes it to the inn; in either case, the rule is, that the owner can claim only the ordinary rights of owner, as against a subsequent bailee, and not the special rights which belong to a guest, unless such special rights are expressly transferred to him by his bailee.

A *bailee* for hire or a gratuitous bailee, who delivers the goods he has as such bailee, to a wrong party, or who, after they are demanded of him does not in any way account for their loss, is liable to the true owner for their value.

And if the defendant is liable for *gross negligence* as such bailee, the action for not delivering the property on a proper demand being made, can be maintained either by the bailee from whom the defendant received it, or by the real owner.

Where there is some evidence given, going to prove that the person in the employ of the innkeeper, who received the property into his possession for the innkeeper, had authority from the innkeeper so to do, it is error to nonsuit the plaintiff, in an action against the innkeeper as bailee. Such evidence should be submitted to the jury.

Fifth District, General Term, April, 1869.

Present, BACON, MULLIN, FOSTER *and* MORGAN, *Justices.*

APPEAL from an order of the Onondaga county court, denying a new trial. The material facts are stated in the opinion.

T. K. FULLER, *for appellant.*

I. The county court erred in not allowing the plaintiff to amend his complaint, *without costs*, where the request to amend was for the purpose of conforming the pleading, to

the proof in the case, as allowed by the court. The judge erred for the following reasons:

1. Because the variance between the pleading and the proof was not material, (*Code, sec.* 170), and *not being material* the court should have directed the *fact* to be found according to the evidence, or should have ordered an immediate amendment, *without costs.* (*id.*)

2. The variance was *not material*, because it did not actually mislead the defendant, to his prejudice, in maintaining his defense upon the *merits.*

The defendant did not *allege* that he had been so misled by the variance, neither did he prove, or offer to prove, to satisfy the court, either that he had been misled, or *in what respect* he had been misled. (*Code, sec.* 169.)

Failing to allege and prove *this*, the Code pronounces the variance *not material*; and not being material, it should have been disregarded, and the case given to the jury on the evidence, or the court should have ordered an immediate amendment, *without costs*, (*Code, secs.* 169, 170, *read together.*)

3. The request to conform, etc., should have been granted.

a. For the reasons above mentioned.

b, Because, neither the *claim* nor the *defense*, would have been substantially changed thereby, and the *facts proved*, which alone fix the *merits* of the case, would remain the same.

4. The court has no *discretion* in cases of this kind, to impose costs, and especially the costs of an hitherto unsuccessful defense.

Discretion is confined to those cases where the variance is *material*; and the Code (*sec.* 169,) teaches us how a *variance* becomes *material.* Other variances are to be disregarded, or cured by an amendment without costs.

If there *were* discretion, would it not be a monstrous exercise of it, to require the plaintiff to pay *four times* the

amount of his claim, in costs, to a defendant unsuccessful on *two* trials, before he could be permitted to go to the jury on the facts proved in the case? (*Variance deemed immaterial when—Catlin* agt. *Gunter*, 1 *Ker.*, 368. *Discretion limited—Amendments to conform, etc., a matter of course. Beardsley* agt. *Stover*, 7 *How.*, 295, HARRIS J. *Case not criticised*).

"Though there has been but one trial, yet, as that trial has been set aside, and a new trial ordered, the court has the same power to allow the parties to amend their pleadings, as though the action had never been tried. (HARRIS, J., 11 *How.*, 170).

"On a *third* trial of this case, the judge allowed the plaintiffs to amend their complaint, *without costs*, or on any terms, so as to conform it to the facts proved." (*Dauchy, et al.*, agt. *Tyler*, 15 *How.*, 399).

A defendant who thinks of succeeding in an action upon errors in the complaint, without regard to the *merits* of his defense, may as well stay out of court as to come in, under the Code." (*Wood* agt. *Wood*, 26 *Barb.*, 359, *and cases cited. See also* 24 *Barb.*, 287).

Discretion even, reviewable when abused,(18 *How.*, 509. *See Van Ness* agt. *Bush*, 22 *How.*, 491. *Case not criticised. Also*, 36 *Barb.*, 27. *Also id.*, 377).

5. The defendant's own testimony, given after the court had refused to dismiss the complaint, at the close of plaintiff's case, shows that the court should have granted the motion to conform the complaint to the facts proved, and that, too, *without costs.*

Denying us this right *to conform, etc.*, to which we are entitled under the Code, the judge of the court below, virtually refused us to go to the jury on the facts and merits of the case, because we were unwilling to pay in costs to the defendant four times the amount of our claim.

This is manifestly wrong, supporting a technical defense as against a meritorious claim.

II. The court erred in excluding the evidence offered, and the exception there noted, was well taken.

III. It is submitted that the court erred in excluding the evidence offered, and that the exception of plaintiff's counsel was well taken.

IV. The court erred in dismissing the plaintiff's case under the circumstances, for the most apparent reasons.

1. Because the court decided, as a question of law, the fact, *whether or not Case was authorized by defendant to receive plaintiff's robe and cushion the second time.*

This was a question of fact for the jury. The proof shows that Case was so authorized.

The defendant Eaton, swears to a sort of *limitation* to Case's authority, on that evening; but in the absence of proof that plaintiff or his agent *knew* of this limitation, it cannot operate to discharge the defendant from his liability in the premises.

The public had a right to *assume*, in the absence of special notice, that Case had all the authority he appeared to be exercising.

This *limitation* is substantially upset, however, by the defendant's own evidence, on his cross-examination.

The *fact*, therefore, as to the extent of Case's authority, should have gone to the jury.

2. Because the court decided, as a question of law, that the defendant was not liable as a bailee for hire, under the proof allowed in the case.

I submit that, since the plaintiff paid 25 cents for the keeping of his robe the first time, it was a question of fact under the proof in the case, whether there was not an implied agreement to pay for the keeping the second time; and therefore the defendant, after a demand and refusal to deliver, became liable as a bailee for hire, unless he should *account for the loss of the property without his fault*, which loss the defendant has uniformly neglected and failed to show,

or attempt to show. (11 *Wend.*, 25; 1 *Daly*, 347, *and cases cited.*)

I ask the court to consider *why* the defendant has never, except in the justice's court, placed his man Case,—the only man who had anything to do with the robes and other property in the ward room, that night, on the stand to account for the loss of the property in question?

A demand, and refusal to deliver, were clearly shown on each trial, and the *onus* was with the defendant to account for such loss. (*id.*)

Because the court withheld from the jury the fact, whether Case, the authorized agent of defendant and acting as such, did not, under the proof, deliver said robe and cushion to the wrong party, thereby being guilty of *gross negligence*, rendering his principal liable as a bailee without hire.

There is proof bearing on this point, which is not contradicted.

This proof is sufficient to justify the inference that defendant had been told by Case, that he, (Case) delivered the robe and cushion to Charles Coykendall the second time he left, as Case swore on the trial before the justice.

If Case delivered the robe to any one, it must have been to the wroug party: if to the wrong party, it was an act of gross negligence.

We had a right to go to the jury on this fact, of which the court wrongfully deprived us.

"When a man doth find goods," says Lord COKE, "it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged; but this is not so, for he which finds goods is bound to answer him for them, who hath the property; and if he deliver them over to any one, unless it be to the right owner, he shall be charged for them." (*2d Parsons on contract*, 3 *ed.*, *p.* 96, *note.*

If the above be true of a finder, for still greater reasons is a party liable, who receives goods from another, and afterwards delivers them to the wrong person. (*Story on Bailment*, §414; *Esmay* agt. *Fanning*, 5 *How.*, 228; *Packard* agt. *Getman*, 4 *Wend.*, 613; 4 *Bing.*, 476.)

WILLARD, J., says, in 5 *How.*, 232, if trover will lie against a common carrier, or a warehouseman, for a misdelivery, it can, under the like circumstances, be sustained against a bailee for hire, or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner. but delivers it to another person not entitled to receive it, he is guilty of a conversion."

V. It is further submitted that the defendant, under the proof in this case, had a lien, as innkeeper, on the robe and cushion in question, for the accommodation of Charles Coykendall and his lady, after their return from the tipover.

If the defendant had that lien, was he not an insurer of said goods, and absolutely liable for their loss while in his custody, without plaintiff's fault, or that of his agent?

VI. It is confidently submitted, that a cause of action was established by the proof in this case.

It should have gone to the jury on the entire evidence in the case, and the court should have instructed the jury to disregard the variance between the complaint and the proof, and decide the case on the evidence, because the variance was immaterial, (*Code*, 169, 170,) or the court should have ordered an immediate amendment, without costs, and then sent the case to the jury on the *facts*.

Neither of which were done; but the questions of fact were decided by the court erroneously, and therefore, the pleading should be amended by this court, and a new trial be ordered, with costs to abide the event.

R. H. GARDNER, *for respondent.*

I. "The complaint on which the cause has been tried in both the justices' and county court, reads as follows: "The

plaintiff complains of the defendant for one wolf robe and cushion left in the possession and care of the defendant, which he neglects and refuses to deliver, and claims damages in the sum of $40."

Under this complaint the cause has been tried in the county court and a verdict given for the plaintiff. On appeal to the supreme court, a new trial was granted on the ground that the plaintiff was not entitled to recover, with directions that the costs should bide the event.

Before opening the cause to the jury, the plaintiff's counsel asked to be permitted to amend the complaint by adding an allegation as follows, viz: "That defendant was an innkeeper and that plaintiff was his guest at the time of the loss of the property in question." This was objected to by the defendant's counsel on the ground that it changed the liability of the defendant, and was in fact an entire new cause of action. It is now insisted that the offer to amend, so changed the form of action, as to impose an entirely new responsibility on the defendant and called on him for an entirely new line of defense to exonerate himself from liability for the loss or damage to the goods. (*Grinnell* agt. *Cook*, 3 *Hill.*, 485.)

It is further insisted that if the county court was right in allowing the amendment, it was *properly* upon the conditions imposed and which the plaintiff's counsel refused to accept.

The county court was right in directing the plaintiff if he amended his complaint, to pay the costs of the former trial and the costs of the appeal to the general term. Otherwise, the defendant would have been subjected to the peril of losing the costs to which he was already entitled, and the further peril of paying the costs of an action which he had already successfully defended. (6 *Hill.*, 377; 3 *How.*, 173; 13 *How.*, 466).

The same offer was made at the end of the plaintiff's proofs, differing only in the fact that it is there offered to

make the complaint conform to the proofs. This was also properly decided within the principles laid down in the above authorities, and because it was a fair exercise of the discretion of the court. (24 *Barb.*, 287; 22 *How.*, 481; 51 *Barb.*, 616).

II. The question put to Coykendall. Also the offer made by the plaintiff's counsel. Also the question, "who tended the bar that night?" Also the question by plaintiff's counsel, were each and all properly excluded by the court as not admissible, and the objections to each were well taken.

III. The propositions marked Nos. 1, 2, 3, 4, made by the plaintiff's counsel, were properly withheld from the jury. There was nothing in either of them requiring a submission to the jury, or that properly belonged to the jury to decide. The questions were properly determined by the court, and no error was committed in refusing to allow them to go to the jury.

IV. The *motion* to set aside the non-suit and to grant a new trial was properly *denied* by the county court. The decision of the county court should be *affirmed* and a new trial *denied*.

By the court, FOSTER, J. This action was commenced in a justice's court. The plaintiff complained of the defendant "for one wolf robe and cushion left in the posession and care of the defendant, which he neglects and refuses to deliver and claims damages in the sum of $40.

The answer was a general denial, &c., a trial was had before the justice, who rendered judgment in favor of the plaintiff for $45 of damages and costs, and the defendant appealed to the county court, where the cause was tried and a verdict rendered for the plaintiff, which upon appeal to this court, was set aside and a new trial ordered.

The cause was again tried in the county court, and before opening the case to the jury, the plaintiff's counsel moved to amend the complaint by alleging that the defendant was

an innkeeper, and the plaintiff was his guest at the time of the loss of the property in question. The motion was denied, except on condition that the plaintiff pay the costs of the previous trial in the county court, and the costs of the appeal to the general term of this court. The plaintiff's counsel declined to amend on the terms imposed by the court and excepted to the ruling.

And it is insisted now, that the ruling of the court below in that respect, was erroneous. That such error was material and calls for a new trial.

It is hardly worth while to discuss the correctness of the decision below, for the plain reason that the amendment applied for could not possibly have benefited the plaintiff.

The undisputed facts show, that Charles Coykendall, who left the robe at the defendant's house and who was the son of the plaintiff, was 25 years of age, that he went to the defendants' to attend a ball or dance, having a lady in his charge: That he borrowed the property in question of his father: That he went there on his own business, and that in doing so, he in nowise was acting as the agent or servant of the plaintiff. And no claim is made that he was a member of the plaintiff's family.

Now the duties of an innkeeper as such, are due only to his guests: To constitute one a guest, it is not necessary that he be at the inn in person. It is enough that his property be there in the charge of his wife, or servant, or agent, who is there in his employment, or as a member of his family; But they must be there in such way that the law implies the property while there, to be in his possession and not in the possession of the person who is there with it, as his bailee. It will not do to hold that a livery man who lets to another a horse or team, which the hirer takes to an inn, can claim as between *himself* and the innkeeper to be a guest, so as to charge him as innkeeper for the horse or team. It is the bailee of the livery man that is the guest, and to him only is the innkeeper responsible *as such*. And

the rule is the same whether the owner of the property hires it out or lends the use of it to the person who takes it to the inn. In either case, the owner can claim only the ordinary rights of owner as against a subsequent bailee, and not the special rights which belong to a guest, unless such special rights are expressly transferred to him by his bailee. And the case also shows that when Charles Coykendall finally left the premises of the defendant, he left the property there to be called for thereafter, so that as to him also the relation of innkeeper and guest, if it had ever existed, was at an end.

The plaintiff then, if he can maintain this action, must do so upon the principles which govern ordinary transactions of bailment and without reference to the special obligations imposed upon an innkeeper.

Soon after arriving at the defendant's house, Charles Coykendall handed his robe to one Case who had charge of the robe room, and had his name pinned on to it. He bought his ticket for the ball for his lady and self, and at about half past 2 o'clock in the morning, left with his partner for home, having paid 25 cents for keeping the robe and taking it with him.

After leaving defendant's house and within a few rods of it, he sheered to the left and drove off the bank. His buggy was tipped over and broken, and his horse escaped from him and with the buggy, except the top part of it including the robe and cushions. He took the robe, and with his lady went back to the house, handed his robe to Case, who said he would pin his name on it again. He then procured a light and went to the place of the accident, found the cushion of the buggy, brought it to the house and delivered it to Case. He staid there with the lady about three hours, having during that time a private room, and they left again paying no bill for the time they were then there; just before starting, he asked the bar-keeper (not Case), if it would be perfectly safe for him to leave the cushion and robe there,

until he could send for them in a day or two, Case who was at the robe room having given him permission to leave them there, and he did leave them and went home.

The plaintiff's counsel then asked the witness: "What did the bar-keeper answer when you asked him if the robe and cushion would be safe if left there until you could send for them?" This was objected to, on the ground that "it is not admissible under the pleadings; also, that the bar-tender is not proved to be in the employ of the defendant."

The objection was sustained by the court and the plaintiff s counsel excepted.

The only evidence then or at any time given in the case to connect the alleged barkeeper with the defendant, was the testimony of Charles Coykendall, that he "had seen this bar-keeper waiting on people to drinks that evening." I think the objection to the evidence offered was correct. Enough had not been shown to make the defendant responsible for any undertaking of his, especially one in regard to storage of property, after the relation of innkeeper and guest, if it existed at all was ended.

It appeared on the trial, that within a day or two thereafter Charles Coykendall demanded the robe and cushion of the defendant: That the defendant did not deliver them to him and no account was given on the trial as to what became of them.

Case was not called by either party as a witness, and aside from the fact that he had charge of the robe room that night, his relations to the defendant were not clearly defined, and the testimony of the defendant himself on that point was to some extent contradictory of itself.

As for instance, he testified consecutively as follows: "No one else in the house was charged with taking charge of robes, &c., except Case; Case was instructed not to check anything unless it belonged to the dancing party.

Q. "How was Case to know who belonged to the party?"

A. Instructed him to know I did not give Case any special instructions that evening on that subject.

And Charles Coykendall testified: that on the trial of the cause before the justice, the defendant swore that Case was in his employ that evening, and that the defendant told him when he demanded the robe, that Case took charge of the robe room that evening.

The only question I have in regard to the case is, whether the above and the like evidence which was given, should not have been submitted to the jury, according to the request of the plaintiff's counsel, for them to decide whether or not Case had authority to receive the robe and cushion for the defendant, of Charles Coykendall when he returned with them after the accident, and whether the defendant or his agent did not afterwards deliver them to a wrong party. For if he had authority to receive them and they in that way came to the possession of the defendant, and were afterwards delivered by him to a wrong person or otherwise lost by his gross negligence, he is liable whether as innkeeper or not and whether he was a bailee for hire or gratuitously so.

The rule is, that a bailee for hire or a gratuitous bailee who delivers the goods he has as such bailee, to a wrong party, or, who after they are demanded of him does not in any way account for their loss, is liable to the true owner for their value (*Willard* agt. *Bridge*, 4 *Barb.*, 361; *Beardsley* agt. *Richardson*, 11 *Wend.*, 25; 2 *Parsons on Contracts 5th ed.*, 96, *note* (*W.*); *Esmay* agt. *Fanning*, 5 *How.*, 228, 232).

And if the defendant is liable for gross negligence as such baileee, the action for not delivering on the proper demand being made, can be maintained either by the bailee from whom the defendant received it, or by the real owner.

The court erred in not submitting the case to the jury and in non-suiting the plaintiff.

A new trial should be granted with costs to abide the event.

SUPREME COURT.

CHARLES G. PATTERSON agt. ELISHA BLOOMER.

On an order of confirmation of a report of a referee fixing the amount of *damages* the defendant is entitled to upon the dissolution of the plaintiff's *injunction*, and deciding that the defendant is entitled to recover the same of the plaintiff, it is improper to enter up *judgment* against the plaintiff and his sureties in the undertaking, upon the report of the referee, for the amount of such damages.

The defendants' remedies against the sureties, are either an action on the undertaking, or by a reference on application to the court, for an order directing the payment of money.

The plaintiff not having signed the undertaking, in this case, the proper remedy against him, is by an order of the court directing him to pay the damages.

New York Special Term, June, 1868.

Before INGRAHAM, *Justice.*

THE plaintiff commenced this action to enforce the specific performance of an agreement for the sale of a quarry, and obtained an injunction giving the usual bond in which he did not join. During the pendency of a motion to vacate the injunction, the plaintiff obtained leave to discontinue on payment of costs and without prejudice to the defendant's rights on the undertaking.

The defendant thereupon moved for a final adjudication and a reference to compute his damages, and procured a reference and a report adjudging his damages to be $2,000, which was confirmed on motion by an order "finally adjudging that the plaintiff was not entitled to the injunction at the time of the making thereof, that the damages sustained by the defendant, thereby amounted to the sum of $2,060, and directed that the plaintiff and his sureties should pay the same to the defendant.

Upon this order, the defendant on December 24, 1868, docketed judgment, issued an execution, and upon its being

returned unsatisfied, obtained an order to examine the plaintiff on supplementary proceedings.

The plaintiff thereupon (June, 1869), moved to set aside the judgment and the order for the supplementary proceedings.

DUDLEY FIELD, *for plaintiff, presented the following points.*

I. The assessment of damages cannot be made until the court has *finally decided* that the plaintiff is not entitled to the injunction. (*Code*, § 222; *Weeks* agt. *Southwick*, 12 *How.*, 171; *Shearman* agt. *N. Y. Central Mills*, 11 *id.*, 271; *Met. Ch.* agt. *Barker*, 18 *N. Y.*, 465).

II. There was no such final decision in this case.

1. The question of injunction was never passed upon, the action having been discontinued.

2. The *final decision* must be a judgment which is *entered*, and no judgment was never entered here, except the one which it is sought to set aside. (*cases supra.*)

III. In no case can judgment be entered upon the referee's report. That only fixes the amount of damages and liquidates them so he can sue on them. (*Wilde* agt. *Joel*, 15 *How.*, 327; *Brier* agt. *Heath*, 12 *How.*, *U. S. R.*, 177).

1. The case in 2 *Cal.* cited on the other side, is overruled here and at most, only decides that a party signing an undertaking, may thereby waive a trial by jury.

IV. The plaintiff here did not sign the undertaking, and is not bound by its terms. He is of course liable for any damages sustained by the defendant, by reason of the injunction, but they must be recovered in another way.

V. The judgment roll is, fatally defective; this is reason enough for setting the judgment aside. (*Townshend* agt. *Wesson*, 4 *Duer.*, 342; *affirmed in court of appeals and not reported*).

GEO. W. WINGATE, *for defendant, argued:*

I. The plaintiff was liable upon the undertaking, whether he signed it or not.

It is required to be "on the part of the plaintiff" "that the *plaintiff* will pay" the damages. (*Code*, § 222).

It is therefore absurd, to say that his filing an instrument binding him to certain damages as a condition precedent to obtaining certain relief, imposes no liability upon him.

In *Askins* agt. *Hearns*, 3 *Abb.*, 188, the court held that a plaintiff was liable *in the same manner*, and *to* the *same extent* without as with the undertaking required by the Code.

An absolute undertaking "*that the plaintiff will pay*" (whether executed by him or by another person), is an undertaking *on his part.* (*Leffingwell* agt. *Chave*, 10 *Abb.*, 476).

II. The regularity of the reference, the report and order of confirmation are *res adjudicata*, each having been executed at the time and no appeal taken. (*See affit.*).

III. The entry of judgment was proper.

1. The court had adjudged the plaintiff liable, had ascertained the defendant's damages and ordered the plaintiff to pay them, which order not having been appealed from, is conclusive. There was therefore, no necessity of any further litigation.

This was in itself an adjudication of an indebtedness—*a judgment.*

It is directly within the words of the Code, "a final determination of the rights of the parties in the action. (*Code*, § 245).

The making up of the *judgment roll* from the papers on file, was the duty of the *clerk*, not the attorney, and has nothing to do with the judgment. (*Code*, § 281; *Renouil* agt. *Harris*, 1 *C. R.*, 125; *Earle* agt. *Barnard*, 22 *How.*, 437).

2. This order was simply a *decree* at special term, which *when filed* became a judgment, and can be enforced by execution.

III. The discontinuance by the plaintiff was an acknowledgement that he could not maintain his action, and that the injunction was improperly granted, and a reference to ascertain the defendant's damages will thereupon be ordered. (*Taaks* agt. *Schmidt*, 19 *How.*, 414; *Crockett* agt. *Smith*, 14 *Abb.*, 62; *See also Coates* agt. *Smith*, 1 *Duer.*, 664; *Mutual Safety Ins. Co.* agt. *Roberts*, 4 *Sand. Ch.*, 592; *The Cumberland Coal and Iron Co.* agt. *The Hoffman Steam Co.*, 39 *Barb.*, 16).

Upon the confirmation of this report therefore, *there was nothing left* to litigate. The order was *to pay* and it unquestionably can be enforced *as an order*, if not *as a judgment.*

It is certainly a misuse of terms, to say that nothing can be entered upon an adjudication of this character so as to reach the debtors real estate or give a right to supplementary proceedings.

IV. In California (where the provisions of the Code are the same as that of New York) the entry of judgment upon the referee's report was not only *sustained*, but was *expressly ordered.* This it is contended is the correct practice.

V. It will be recollected that the right to a judgment is not asked against *the sureties*, against whom a new suit will undoubtedly be necessary, but between a plaintiff and defendant where all points have been conclusively adjudcated. (*Interest reipublicae ut sit finis litium. Broom's Maxims*).

VI. The plaintiff having known of this judgment since December, 1868, and promised to pay it—it is now too late for this motion, particularly as the claim is conceded to be due, and the equities are all in favor of the defendant.

INGRAHAM, J. On the disolution of an injunction the defendant obtained an order of reference to assess the damages on the undertaking.

The undertaking was only signed by the sureties. Referee reported the amount of damages sustained, which report was confirmed, and it was decided that defendant was entitled to recover the same of the plaintiff.

The same not being paid on demand, the defendant entered judgment on report. So far as the sureties are liable, I do not think a judgment against them would be regular, until an action was commenced and summons served, or at least until notice had been given to them of the hearing before the referee. (12 *Abb.*, 189; 15 *Abb.*, 427). Nor do I see the propriety of entering a judgment against the plaintiff.

The defendant has two ways of enforcing a recovery on the undertaking, one by an action, the other by a reference. In the first he proceeds to judgment, in the other he applies to the court for an order directing the payment of money, and enforces it in the same manner as other orders of a similar character.

Where the plaintiff has not signed the undertaking, there can be no propriety in entering a judgment against him, and the only proceeding against him would be by an order of the court directing him to pay the damages.

I see no way in which this judgment can be sustained.

In granting the motion, I do not award costs, and the order must be without prejudice to any other proceedings the defendant may take, either by action on the undertaking or on the report, or by proceedings by way of attachment.

The motion was granted upon these conditions.

SUFFOLK COUNTY COURT.

STEPHEN CONKLIN, appellant agt. GEO. FIELD, respondent.

The fact that a party has sued for a part of a promissory note and recovered, supposing at the time, that the remainder had been paid, does not prevent him afterwards, on discovering that the remainder has not been paid, from maintaining an action to recover it—the former suit is not a bar to the latter.

In his complaint the plaintiff need only allege a balance due on the note; he is not required to set forth the mistake which caused him in the former suit to claim only a part, instead of the whole amount of the note.

A reply being inadmissible in justice's court, the allegation of new matter, in the answer, must in all cases, be deemed controverted by the plaintiff, and it is competent for him to countervail it by evidence, either in direct denial or by way of avoidance; the plaintiff must state a cause of action, and that is all that is required.

January Term, 1869.

THE complaint simply claims a balance of $40 due on a note for $50 by defendant to plaintiff. The answer sets up a general denial, and a former suit on said note in bar of this.

THOS. YOUNG, *for appellant.*
HENRY C. PLATT, *for respondent.*

HENRY P. HEDGES, County J. The plaintiff held a note against the defendant for $50. In June, 1867, he brought an action in justice's court claiming a balance of $10 and interest due thereon. In April, 1868, he brought another action on the same note and claimed $40 due thereon.

The note was proved. The defendant introduced in evidence the judgment in the former action in support of his plea thereof in bar of the action, and he pleaded also a general denial.

An indorsement "May 15, 1866, received $40," was by consent erased from the note on the trial. The plaintiff

then offered to prove that the indorsement of $40 was made under a mistake of fact, he, at the time, believing himself authorized to indorse that amount by Geo. Field, Jr., and that the $40 had been, since the former suit, recovered against him by said Geo. Field, Jr.

The defendant's counsel objected to the introduction of this evidence as inadmissible under the complaint, no mistake of fact being alleged therein, and also that the former suit on the note, was a bar to this.

The objection was sustained and on motion a non-suit was granted. The plaintiff appeals from the judgment of non-suit rendered by the justice.

The defendant's counsel maintains that the mistake of fact should have been pleaded in the complaint to entitle the plaintiff to give evidence thereof.

A reply not being admissible in justice's court, the allegation of new matter in the answer must in all cases be deemed controverted by the plaintiff, and it is competent for him to countervail it by evidence, either in direct denial, or by way of avoidance. Where the defense is infancy the plaintiff may, without replying, or amending his complaint, prove the making of a new promise by the defendant after he attained majority. (*Hodges* agt. *Hunt*, 22 *Barb.*, 150).

The plaintiff still claims the unpaid $40 as due on the note.

The defendant insists that the note is merged in the judgment.

A judgment upon a contract technically merges the demand, but not in so complete a sense that the courts cannot look behind it for the purpose of protecting the rights of the parties. (*Clark* agt. *Rowling*, 3 *N. Y.*, 216; *Dresser* agt. *Brooks*, 3 *Barb.*, 429; *Wyman* agt. *Mitchell*, 1 *Cow.*, 316).

If the plaintiff has a right to recover at all, it is upon the

balance due on the note. He complained claiming that balance. and I think rightfully.

He was not bound to anticipate and deny, or avoid the defense.

He must state a cause of action and he did so. The answer undenied or avoided is a bar, but that is deemed to be controverted by the plaintiff just as truly as if he had pleaded the very ground of avoidance offered by him to be proved. I think the plaintiff has a right to establish the fact that the indorsement and the former action were made, and brought under a mistake, and that the doctrine of merger cannot in this case be so deemed to apply as to work a virtual fraud.

The judgment of the justice's court must be reversed.

COURT OF APPEALS.

CATHARINE JENKINS, administratrix, and THOMAS G. WAIT, administrator, &c., respondents agt. DAVID E. WHEELER, appellant.

The *master of a vessel*, has no lien on the freight nor on the vessel for his wages. The maxim that "freight is the mother of wages," has no relevancy or application whatever to the contract of a master for his compensation, as such. His contract is to be governed by its terms, and by the same rules which are applied to the construction of other contracts.

Where the master agreed with the owner to take charge of the vessel then lying at the port of New York, for her then present voyage to Australia and return to New York, according to instructions received, and the owner agreed to pay him $150, for each and every month of said period during said outward and return voyage—and during the voyage the vessel put into the port of Bahia, South America, for water, and again put into Cape Town on the coast of Africa, for water and fresh provisions; after leaving Cape Town, she encountered heavy winds and lost her rudder—leaked badly, when she was run into Port Louis on the Island of Mauritius, where she was abandoned to the underwriters, and the voyage abandoned:

Held, no fault being established against the master, that he was entitled to recover wages for the period during which he performed the service as master, to wit: from the time of the inception of the voyage, on the 8th of February, 1853, to the date of its abandonment and breaking up on the 8th of September, 1853.*

September Term, 1867.

J. W. EDMONDS, *for appellant.*
C. N. BLACK, *for respondents.*

DAVIES, Ch. J. Oliver N. Jenkins, the plaintiff's intestate, was employed by one Anthony Pelletier to take charge of the bark Peytona, then lying in the port of New York, on her then contemplated voyage to Australia. The title of the bark then stood in the name of the defendant, as owner,

*NOTE.—Although the majority of the court in this case did not consider that the question or point principally discussed in this opinion, was raised upon the trial and therefore not reviewable on the appeal, yet the able discussion of that question by the learned judge and the array of authorities cited by him to establish it, will, no

although, in fact, he was not such owner. On the 8th day of February, 1853, the defendant, in whose name the title to the bark stood, and Jenkins, entered into an agreement, substantially as follows: The said Jenkins thereby agreed to and with the defendant, to take charge of the bark Peytona, then lying in the port of New York, for her then present voyage to Australia, and return to New York, according to instructions given him by Anthony Pelletier; and Jenkins agreed to use his best efforts for the interests of the said bark and owners.

And the defendant covenanted and agreed that he would pay to Jenkins, in consideration of said services, the sum of one hundred and fifty dollars for each and every month of said period during said outward and return voyage.

The bark was owned by said Pelletier, and Overman & Gruner; and they were the persons beneficially interested in said voyage.

The instructions of Pelletier to Jenkins, under date of February 7, 1853, are set out in the case, and show fully that Pelletier assumed the sole control and direction of the voyage. The defendant offered to prove on the trial, that this agreement between himself and Jenkins was signed by him solely for and on behalf of said Pelletier, Overman & Gruner; that they were the only persons beneficially interested in said bark Peytona; that the defendant had no benificial interest in her or her cargo or voyage; that he was not interested in or connected with any other ships or mercantile business; and was connected with said bark Peytona only as holding the naked legal title to her, for and on behalf of

doubt be found very useful to the profession as a reference; especially as it is a question arising in the every day affairs of life. The question is this: Whether, where a contract as an entirety is entered into by a party, creating a duty or charge upon himself, the compensation therein specified, is to be made to him only upon its performance; that such performance is a condition precedent, and no action can be maintained until such performance has taken place, unless the party upon whom such performance rests, establishes a valid and legal excuse for the omission or non-performance. REP.

said Pelletier, Overman & Gruner; that all these facts were known to said Jenkins, and to all parties having dealings with said bark Peytona, or her owners, before said agreement in suit was executed; and that Jenkins, in making such agreement, gave credit to and relied upon the responsibility of said Pelletier, Overman & Gruner, and not upon that of the defendant.

To this evidence the plaintiffs' counsel objected, and upon such objection the same was excluded. In the further consideration of this case, we shall assume that the matter so offered in evidence, and excluded on the plaintiffs' objection was true, and could have been proven. The bark Peytona sailed on her intended voyage from the port of New York soon after the date of said agreement, and was compelled, in the judgment of the master, to put into the port of Bahia, South America, by reason of shortness of water. After leaving Bahia the vessel put into Cape Town, on the coast of Africa, for water and fresh provisions. After leaving Cape Town, the bark encountered heavy winds and lost her rudder; and the vessel leaked, and the captain then put into Port Louis, on the island of Mauritius, where he arrived on the 16th of August, 1853. On the 8th of September following, the captain abandoned the vessel to the underwriters, and she was advertised for sale; and the further voyage was then abandoned. The judge at the trial instructed the jury that the plaintiffs (in whose name the suit had been revived upon the death of Jenkins) was entitled to recover of the defendant $150 a month, from February 8, 1853, to November 25, 1853, and for such further period of time as would be reasonably required for captain Jenkins to return to New York from Mauritius, by the first usual mode of conveyance that presented itself after November 25, 1853, with interest on the aggregate amount from February 14, 1855, unless the voyage was broken up through the unskilfulness, negligence, fault or fraud of captain Jenkins, in which event the defendant was entitled to

a verdict; or unless some damage had accrued to the defendant from the fault, negligence, unskilfulness, or fraud of the captain in the line of his duty.

The defendant claimed that the voyage was broken up by reason of the negligence, unskilfulness, neglect, fraud, and fault of the captain in this:

First. That the vessel could have been repaired and proceeded on her voyage, and therefore the captain was not justified in abandoning her, and causing her to be advertised for sale.

Second. That the captain, without good cause, deviated twice from the course of the voyage, and put into Bahia and Cape Town, and remained there longer than was necessary, and thereby caused the vessel to encounter the storm which was the immediate cause of the necessity of putting into Mauritius.

The judge charged, that if the jury should find both that the captain could have procured sufficient means to repair the vessel, and that under all the circumstances it was best for the interests of the owners that she should be repaired at Mauritius, then their verdict was to be for the defendant. If, however, they should find either that the captain could not procure sufficient means to repair the vessel, or if he could, that it was not for the best interests of the owners to have the repairs made at Mauritius, then the captain was justified in abandoning the vessel and advertising her for sale; and the judge further charged, that if after taking all the matters referred to into consideration, with the other facts proved in the case, the jury should come to the conclusion that means could have been raised for making these repairs, and that it was for the best interests of the owners that the repairs should have been made at the port of Mauritius, then that dispossd of the case in favor of the defendant, and there was no necessity for considering the other matters set up in his defense.

If, however, the jury should come to a contrary conclusion, then, in order to find for the defendant, they would consider the second claim of the defendant, which was. whether the captain, without good cause, deviated from his course to put into Bahia and into Cape Town, and remained there longer than was necessary, and by such deviation contributed to the disaster which finally compelled the ship to put into Mauritius. And he also charged, that if the jury should find that the captain, without just cause, did deviate from the proper course laid down for the prosecution of the voyage, and did remain longer than was necessary, and that these two things contributed to the final disaster, then, in that event, the jury were directed to find their verdict for the defendant. He further charged, that if the jury should find against the defendant upon these three points, then that they should find for the plaintiffs, unless, by reason of some further negligence or unskilfulness of the captain, in the line of his duty, some damage had occurred to the owners, and that, in that case, the jury should inquire what the damage was, and deduct the amount from what the captain would otherwise be entitled to recover, and give a verdict for the balance in favor of the plaintiffs.

The defendant excepted to the charge, as to the time for which wages were recoverable, on the ground, that if recoverable at all, that they could not be recovered for a longer period than from the inception of the contract sued on to the breaking up of the voyage.

The defendant also excepted to that portion of the charge which stated that the plaintiff was entitled to recover unless the voyage was broken up through the unskilfulness, negligence, fault or fraud of captain Jenkins. Also, to that portion of the charge in reference to the first and second claims set up by the defendant; and also as to what the judge charged the jury, in reference to the damage sustained by the owners, arising from the negligence or unskilfulness of the captain, or from the unjustifiable deviations (if the

jury should find such deviations unjustifiable) made by the captain in the prosecution of the voyage. The jury found a verdict for the plaintiffs for the sum of $5,285—thus allowing the captain his monthly wages, as specified in the contract with the defendant, up to October 11, 1854, the time of his arrival in the port of New York, and interest on that sum from February 14, 1855.

Judgment was entered at the special term of the New York supreme court, in accordance with the verdict, for the plaintiffs, and on appeal to the general term of that court, the judgment, by consent of the plaintiffs, was modified by deducting therefrom the amount allowed the plaintiffs for the wages of the intestate from May 27, 1854, to October 11, 1854, amounting to $675, with interest from February 14, 1855, amounting, in all, to the sum of $1,195.53; and the general term affirmed the judgment with such deductions.

The verdict of the jury must be taken and assumed to have established the following facts in this action:

1. That the voyage in question was not broken up through the unskilfulness, negligence, fault or fraud of captain Jenkins.

2. That the vessel could not have been repaired at Mauritius, and have proceeded from thence on her contemplated voyage to Australia; and that the captain was justified in abandoning the vessel, and such voyage, at Mauritius, and causing the vessel to be there advertised for sale.

3. That the captain did not deviate twice from the course of his voyage, by putting into Bahia and Cape Town, without good cause; and that he did not remain in those places longer than was necessary, and that such deviations and delays were without fault on his part.

4. That the owners of said bark did not sustain any damage by reason of the fault, negligence, or unskilfulness of the captain in the line of his duty.

These facts being established, if no error was committed upon the trial, it would follow, as a necessary consequence, that the captain, if entitled to recover at all, was entitled to recover the wages agreed upon from the defendant, so long as he continued in command of the vessel.

We are to bear in mind, however, in looking into the rights of the captain, that they arise and grow out of the contract made with the defendant, so far as any liability on his part exists.

The law of England, and that of this country, holds that the master has no lien on the ship for his wages, and it is now definitely and clearly settled in England, that the master contracts upon the credit of the owner, and not of the ship, and that he has no lien on the ship, freight or cargo, for any debt of his own, as for wages, or stores purchased, or repairs done at his expense, either at home or on the voyage. The reason for this laid down in the books of the common law is, that although mariners are supposed to contract on the credit of their ships, the master's contract is altogether of a personal nature, on the credit of the owner (12 *Mod. R.*, 405; *Read* agt. *Chapman*, 2 *Strange*, 937; *Ragg* agt. *King*, *id.*, 858; *Clay* agt. *Sudgrave*, 1 *Salk.*, 33; *S. C.*, 1 *Ld. Ray.*, 576; *and Carth.*, 518; *Curtis' Rights, &c.*, *p.* 252; 3 *Kent's Com.*, *p.* 166).

Chancellor KENT, thought this doctrine in the English law remained yet to be definitely settled and declared in this country, and refers to various cases in which the English authorities have either been overruled, questioned, or qualified by the judges in the United States. But he says, that by the case of *Van Bokkelin* agt. *Ingersoll*, (5 *Wend.*, 315), as settled by the court of errors in New York, the English law was recognized, that the master had no lien on the freight, nor on the vessel, for his wages. If it were necessary to the decision of this case, we should feel bound to adhere to the doctrine thus promulgated by the highest court of this state as the law of this state, and which has

been a recognized rule of law therein for nearly forty years.

The master's contract is therefore to be governed by and construed by the same rules of law as are applicable to other contracts.

The doctrine in relation to mariner's contracts, and to those of seaman for wages, and the maxim that "freight is the mother of wages," have no relevancy or application whatever to the contract of a master for his compensation as such. That contract is to be governed by its terms, and by the same rules which are applied to the construction of all other contracts.

By the terms of captain Jenkin's contract with the defendant, he agreed to take charge of the vessel, and be governed in the discharge of his duties, as master thereof, according to the instructions given to him by Pelletier, and to use his best efforts for the interest of the said bark and owners. A faithful compliance with these terms was a condition precedent to his right to demand and receive the stipulated wages. The case of *Van Bokkelin* agt. *Ingersoll*, (*supra*), held that the captain, to entitle himself to his wages, must show that his conduct was that of a prudent, judicious, and careful master. The judge at the trial therefore, properly told the jury that the plaintiffs could not recover, if the voyage was broken up through the unskilfulness, negligence, fault or fraud of captain Jenkins. *In Macy* agt. *Wheeler*, (30 *N.Y.*, 231), which was an action for supplies furnished this same vessel, where the same facts appeared as to the ownership of this vessel as were given in evidence or offered in evidence upon the trial of this action, this court held, that it was indubitably established that Pelletier was the real owner of the vessel, both before and after the transfer to the defendant; that the defendant had no interest in her or her earnings, and that they belonged to Pelletier, or those to whom he transferred them. That under these circumstances the defendant was not liable for supplies, unless purchased by him, or by some person authorized by him.

Applying the doctrine of this case to the one now under examination, it follows, that independent of the contract given in evidence, there would be no liability whatever on the part of the defendant for any wages due the captain, or for services rendered by him for or on account of this vessel or her owners, or for their benefit. No implied promise, therefore, could be raised that the defendant was to pay for the same, as captain Jenkins well knew the special relations this defendant held to said vessel, and to her owners. And it also follows, that whatever may be the liability of the owners to the captain for services rendered on a *quantum meruit*, or on implied assumpsit, the defendant's liability can alone spring from, and must be measured by his contract. But it was competent for the defendant to stipulate and agree to pay either the captain's wages or to pay for supplies furnished the vessel, or any other liability which he might elect to incur; such agreement or undertaking was in its nature collateral to the primary liability of the owners for the debt, which was in fact theirs. The position of the defendant in this action is that of surety for the owners, who are primarily bound to pay and discharge the wages of the captain employed by them to navigate their vessel, and for their benefit. In this aspect we are to regard the defendant's undertaking, and the liability arising therefrom. A careful examination of the contract entered into between the parties, will show what each contracted to perform, and the liabilities imposed thereby upon each. Captain Jenkins agreed, on his part, to take charge of the bark, for her then present voyage to Australia and return to New York, according to the instructions given to him by Pelletier. By reference to them, it will be seen that a round voyage was contemplated from New York to Australia and back. And in consideration of the said services the defendant agreed to pay Jenkins the sum of $150 per month for each and every month of said period, during said outward and return voyage. This contract was entire, and for the round voyage,

and unless there was full performance on the part of Jenkins, the defendant cannot be called upon, in accordance with the terms of his contract for payment, as for a part performance. The current of decision on this question is too uniform, and the principles settled too firmly established to permit them to be questioned or departed from.

It is needless to go outside of the discussion had upon this question in this state. The case of *McMillan* agt. *Vanderlip*, (12 *John.*, 165), contains an elaborate review of the English cases, and enunciates the settled rule of law with precision and entire accuracy. In that case the agreement was, that the defendants were to pay Vanderlip 3 cents per run for spinning, and that he was to work for them 10½ months, and the plaintiff claimed for spinning 845 runs at 3 cents per run. The question was, whether the contract was an entire contract, performed on the part of the plaintiff, operating as a condition precedent, or whether the agreement to pay 3 cents a run on one side, and the promise to work for 10½ months on the other, were independent and unconnected with the rate at which the defendant was to spin. Judge SPENCER said: "It is evident to my mind, that the parties before us intended that Vanderlip should serve the McMillan's for 10½ months, and that he should be paid 3 cents for each run of yarn spun by him, and that they intended this as one entire contract. * * * If the contract was entire, and looked as well to the price per run as to the time of service, it necessarily formed a condition precedent; and then Vanderlip could not sue until he had performed his contract of service, or until the period within which it was to be performed had elapsed." In view of this authority, we must regard the contract in the present case as one entire contract, and that the rate per month stipulated therein was to be paid on full performance of the condition precedent on the part of Jenkins, namely: the services as master of the vessel for the whole period of the round voyage. In *Reab* agt. *Moor*, (19 *John.*, 337), affirmed

in the court of errors, this case of *McMillan* agt. *Vanderlip*, was cited with approbation, and it was held, that when M. had contracted to work for R. for eight months, for 104 dollars, or 13 dollars a month, that the performance of the work was a condition precedent, and that M. could not recover for three months' work performed.

It was also held, that the written contract between the parties was an entire contract of hiring for eight months, at a stipulated price. That M. was to work eight months for R, for which R. was to pay him 104 dollars, or 13 dollars a month—not 13 dollars at the end of every month, but the entire sum of 104 dollars to be paid was to be equal to that rate of compensation. So in the case at bar, it is clear that the monthly rate fixed was not to be paid at the expiration of every month; but when the round voyage was completed, Jenkins was to be paid at that rate for the time necessarily consumed in making it. (*See also Webb* agt. *Duckingfield*, 13 *John.*, 390; *Burril* agt. *Cleeman*, 17 *John.*, 72).

In the latter case, the action was brought upon a covenant to a charter party. The defendant agreed for the charter and hire of the vessel from New York to Pernambuco and back for the sum of $1,400, on delivery of the return cargo, on arrival of the vessel at New York. The vessel went to Pernambuco, but in consequence of the port being blockaded, could not land the outward cargo, or take in a return cargo, but returned to New York with the cargo as originally laden on the vessel.

Van Ness, J., In the opinion of the court, said: "The freight stipulated to be paid by the charter party depended upon the performance of the voyage, and was a condition precedent to the freight being payable; and this condition not having been performed, the freight cannot be recovered." To the same effect are the following cases: *Lantry* agt. *Parks*, (8 *Cowen*, 63); *Monell* agt. *Burns*, (4 *Denio*, 121). It will now be convenient to examine the doctrine settled by this court upon this question. This subject received a

very thorough discussion in the learned and exhaustive opinion of COMSTOCK, J., in *Smith* agt. *Brady*, (17 *N. Y.* 173). It contained a review of the authorities, and deduces from them this principle: That according to the settled law of this state, a plaintiff cannot recover the payments, which by the terms of a true construction of the contract are due, only on condition of performance by him, unless he can show such performance, or prove that it has been waived.

The same doctrine was reiterated in *Cunningham* agt. *Jones*, (20 *N. Y.*, 486). In that case it was held that the contract (an agreement to erect a brewery upon the defendant's land, without any stipulation or agreement as to the time and manner of payment, except that the labor was to be performed by day's work) was an entire one, and indivisible, and that the contractor was not entitled to recover without a full performance on his part. It matters not that no price was fixed upon as a compensation. The defendant had a right to insist, before he was called upon to pay, that the contract should be first performed. The same doctrine was re-affirmed in *Baker* agt. *Higgins*, (21 *N. Y.*, 397). It is deemed clear, that by the terms of this contract, the defendant agreed to compensate the plaintiff's intestate for the round voyage, at a certain rate of compensation per month, for the time thus employed in fulfilling the contract, and that such compensation was not due and payable until the performance on the part of Jenkins of the conditions precedent to such payment.

In *Oakley* agt. *Morton*, (11 *N. Y. R.*, 25), this court decided that a condition precedent must be strictly performed to entitle a party to recover.

Judge ALLEN, in his opinion, said: "Whenever a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract" (citing numerous au-

thorities). Judge JOHNSON, in the same case, said: The performance must be exact, not *cy pres.*"

The voyage which plaintiffs' intestate agreed to perform, was not made. It is clear upon all the authorities, that they cannot recover, unless some valid and legal excuse is shown for the nonperformance by him. The plaintiffs claim that the interruption of the voyage, and the sale of the vessel at Mauritius, furnish such an excuse. To this the defendant is at liberty to say, "*Non in hæc fœdere veni.*" Inevitable accident on the part of a third party is not an adequate excuse. The fault of the defendant alone is available for such a purpose. As was correctly observed in the case last cited, such "accident by inevitable necessity is not available, because he might have provided against it by his contract."

This court decided, in *Harmony* agt. *Bingham*, (12 *N.Y.*, 99), that when a party unconditionally, by express contract, agrees to do an act, performance is not excused by inevitable accident or other unforeseen contingency not within his control; and in the opinion of the court, by Judge EDWARDS, it is said "that this rule has been uniformily followed, and that, too, even in cases in which its application has been considered by the court as attended with great hardship. The only exception that has ever been acknowledged, is where a party has contracted to do a thing which the law considers impossible.

Judge RUGGLES said; "It is a well settled rule of law, that where a party, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events. And in such a case, therefore—that is, in the instance of an absolute and general contract—the performance is not excused by an inevitable accident, or other contingency, although not foreseen by or within the control of the party." The same doctrine was enunciated by this court in *Tomp-*

kins agt. *Dudley*, (25 *N. Y.*, 272). There the plaintiffs, as trustees of a school district, sued to recover moneys advanced by them towards the erection of a school house, paid on account to one Chambers, who had contracted with plaintiffs to erect and build it for a certain sum, and the defendant had guaranteed the faithful performance of the contract by Chambers. Before the building was entirely completed, it was destroyed by fire. This court held, that the plaintiffs were entitled to recover, and that the justification for nonperformance, the destruction of the building by fire and inevitable accident, without any fault on the part of the contractor, was no legal justification for the nonperformance of the contract. The case of *Adams* agt. *Nichols* (19 *Pick.*, 275) was referred to. In that case, MORTON, J., in delivering the opinion of the court, said: "The defendants do not pretend that they have executed their contract to build a house for the plaintiff, but contend that the facts disclosed furnish a legal excuse for not doing it. In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there was any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to release persons from the improvidence of their own acts." In harmony with these principles is the case of *School Dist. No.* 1 agt. *Dauchy*, (25 *Conn.*, 530) and also an instructive case of *School Trustees of Trenton* agt. *Bennett*, (3 *Dutcher*, *N. J.*, 514). The supreme court of that state in its opinion says:

"No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own *contract*, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." In reference to the hardship of such a rule, the court very justly says: "No matter how harsh and apparently unjust in its operation the rule may occasion-

ally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should *do it*, unless absolutely impossible. He should provide against contingencies in his contract. When one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement." To the same purport is the law of *Catlin* agt. *Tobias*, (26 *N. Y.*, 217).

It logically follows from these authorities, that the contract of the plaintiffs' intestate with the defendant was for the round voyage and an entirety, and that the compensation therein specified was to be made upon its performance; that such performance was a condition precedent, and no action could be maintained until such performance had taken place, unless the party upon whom such performance rested established a valid and legal excuse for such omission or nonperformance; that none such has been shown in this case, and, as a consequence, neither the plaintiffs' nor their intestate are entitled to claim such compensation. If these views are concurred in, it follows that the judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

The majority of the judges are, however, of the opinion that the points discussed in the preceding opinion were not raised upon the trial of this action, and therefore are not now available to the defendant. But they are of the opinion that the exception to the charge, as to the time for which wages were recoverable, if recoverable at all, that they could not be recovered for a longer period than the inception of the contract sued on to the breaking up of the voyage, presents the question distinctly for what period of time the plaintiffs are entitled to recover wages of the cap-

tain from the defendant. This court is of the opinion that such recovery must be confined to the period during which captain Jenkins performed the service as master, namely: from the time of the inception of the voyage, on the 8th day of February, 1853, to the date of its abandonment and breaking up on the 8th of September, 1853.

The judgment appealed from is therefore affirmed, without costs of this appeal, if plaintiffs elect and consent to deduct all allowances for wages after September 8, 1853, and interest thereon included in the judgment. If they do not so elect and consent within twenty days after notice of this judgment, the said judgment is reversed and a new trial ordered, costs to abide the event.

WRIGHT, PORTER, FULLERTON and PARKER, JJ., concur in reversing, unless there is a reduction of damages to compensation while actually navigating vessel.

Affirmed, conditionally.

HUNT, J.. and GROVER, J., dissent.

SUPREME COURT.

McVICKER agt. Ross and others; HARRIS agt. SAME; WILLIAMS agt. SAME. In the matter of HASKIN agt. Ross and others; FARGO and others agt. BLATCHFORD and others.

Although a *dissenting shareholder of a joint stock company* to consolidation with another company, like a retiring partner in an ordinary partnership, is not to be obliged, in the absence of express agreement to that effect, to surrender his interest in the property of his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale, in the only manner recognized by law for closing up partnerships in the absence of express stipulation:

Yet, where there is great disparity between the amount of stock assenting and that dissenting to be consolidation, with a just regard for the interests of all the parties concerned in the consolidated company, the court will order that the consolidated company, the defendants in the action, give *ample security* that the property transferred to the consolidated company, shall, if so required by the judgment of the court on the termination of the litigation, be delivered into the custody of the court, for the protection of all the parties interested.

The plaintiffs, in such action, have no absolute right, though it is very common and usual to do so, to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver; their right, if they are entitled to have the property sold, is to have it sold when they have recovered judgment.

New York Special Term, August, 1869.

CARDOZO, J. In the first three above entitled cases a motion is made to appoint a receiver of the property of the Merchants' Union Express Company, and in them and in the matter fourthly above entitled, I am asked to remove Mr. William F. Allen, from the position of receiver of a certain portion of such property, to which he was appointed by an order made in the suit of *Haskin* agt. *Ross, &c.* I have concluded to deny these applications, except as hereafter stated, for the following reasons:

I think that at this stage of the litigation the relief sought is under the circumstances unnecessary for the full pro-

tection of the plaintiffs, and would be a needless hardship upon some of the defendants. The amount of dissentient stock is quite inconsiderable in comparison with the large amount of stock which has acquiesced in the agreement of consolidation, and while I am of the opinion that a dissenting shareholder in these joint stock companies, like a retiring partner in an ordinary partnership, is not to be obliged, certainly at all events in the absence of express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale in the only manner recognized by law for closing up partnerships in the absence of express stipulation:

Yet the great disparity between the amount of stock assenting and that dissenting and a just regard for the interests of all the parties concerned in the consolidated company, lead me to the conclusion that such an order should, and I think, can now be made without disturbing the present condition of affairs, as will make every discontented shareholder perfectly safe until a final decree can be made, settling and adjudging definitely the rights of the parties.

With that view, while denying the motion for receiver, and vacating the injunction issued, except so far as to prevent any attempt to forfeit stock of dissenting shareholders, I shall do so only on condition that the defendants furnish a bond with sureties to be approved by one of the justices of this court, conditioned that, upon the final judgment, all the property which belonged to the Merchants' Union Ex-Express Company, and which was transferred to the consolidated company, shall, if so required by the judgment, be delivered into the custody of the court through such officer for that purpose as it may appoint, and also that in case by use, lapse of time or otherwise any of the property shall have diminished in value, then to make the same, by a payment in cash, up to the full value to be ascertained as hereinafter mentioned.

This, I think, will protect everybody without doing harm to any one. The plaintiffs have no absolute right, though it is very common, and, indeed, most usual to do so, to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver; their right, if they are entitled to have the property sold, is to have it sold when they have recovered judgment. All that they can claim, is that the property shall be preserved until judgment, so that their rights as then ascertained and declared may be enforced.

I do not understand the case of *Spicer* agt. *Haresceup*, decided by judge DALY, on the 30th of April, to which Mr. Sewell invited my attention after the argument, to conflict with the general rule, that a sale is the only method of closing up a partnership, if the partners cannot agree among themselves upon a division of some other method; I understand Judge DALY to have done substantially what I have determined to do here. He obliged the defendant to give security, so that the plaintiff should be safe when final judgment was obtained.

To carry my views into effect there must be a reference to James M. Sweeny, to ascertain and report all the property of every name and description and the value of each item which belonged to the Merchants' Union Express Company, and which was transferred to the consolidated company; and upon the coming in of that report I will fix the amount of the bond which the consolidated company must give as a condition of retaining the property pending the litigation, thus in effect constituting them receivers *pendente lite*.

I have intentionally avoided expressing any opinion on the merits or on the various questions discussed before me, believing that in the view I have taken of the present necessities of the case, I ought to leave them to be disposed of upon a regular trial.

Respecting the application to remove Judge Allen from the partial receivership which he holds, I think it sufficient to say that while I do not mean to be understood as approving the method which the parties took to procure that receivership, yet in view of the fact that the receiver is the officer of the court and under its control, and that the gentleman who holds the position is personally wholly unobjectionable and might very well have been selected for such a trust in a perfectly proper and legitmately conducted proceeding, I do not think that it is necessary for me to make any change at present. This leaves only the case of *Fargo, &c.*, agt. *Blatchford, &c.*, in which the plaintiffs seek to have the consolidation agreement confirmed and to restrain the suits brought to impeach it, and in which they ask the continuation of the preliminary injunction which has been granted.

It may be doubted whether that bill can be sustained, but I do not think it necessary to determine the question; because, after the disposition that I have made of the other cases and in view of the fact that the defendants in this suit can obtain any affirmative relief that they may show themselves entitled to, whether of the character demanded in their complaints in the other cases or otherwise, and that the litigation will be presented in a more convenient form than if conducted in many suits, no harm can be occasioned by continuing the injunction in this case, and therefore I think it best not to interfere on a mere motion with the temporary order, but to leave the defendants to the more solemn and regular course of a demurrer if they see fit, instead of litigating the whole merits of the controversy, as they can do, in the convenient form which the plaintiffs afford them by this action, to insist upon their right to a determination of the legal objections which they raise to the complaint.

An order to carry these views into effect may be prepared by either party and may be settled on notice, and either par

ty may make such suggestions for my consideration as he may desire respecting the provisions of the bond and the order of reference hereinbefore mentioned. The costs of the motions will be taxed in the causes and abide the event thereof.

N. Y. SUPERIOR COURT.

WILLIAM H. BALL and others agt. MILTON A. GOODENOUGH and others.

An application for the appointment of a *receiver in supplementary proceedings*, must be made to the judge who granted the order of reference, and appointed the referee.

The order should be a chamber order and filed with the clerk of the city and county of New York; and it is only from the time the receiver receives a copy of the order, certified by the county clerk that he has any power to act at all.

The judge in such an order has no authority to direct an assignment of personal property, and can only forbid the transfer of debts owning to the judgment debtor, until the receiver can sue.

Special Term, August, 1869.

THE plaintiff in this case instituted supplementary proceedings against the defendants to collect a judgment recovered by them against the defendants, and for that purpose procured an order from his Honor Judge MONELL, requiring the defendants to appear and be examined concerning their property, it appears that afterwards the plaintiffs procured an order from his Honor Judge FREEDMAN, appointing a receiver of the property of the judgment debtor.

Mr. H. C. DENISON, *counsel for the judgment debtor*,

moved to vacate the order on the ground, that under the Code, Judge FREEDMAN had no power to make the order, and that Judge MONELL, who granted the original order for the examination of the judgment debtor, was the proper judge to appoint the receiver.

MCCUNN, J. The rule is now settled that an application for the appointment of a receiver must be made to the judge who granted the order of reference, and who appointed

the referee to examine as to the property of the judgment debtor. No other judge out of court has the power. Such was (*Code* 298) the practice as held in the case of *Smith and another* agt. *Johnson*, (7 *How. R.*, 39). Again, the Code requires that the order should be a chamber order, and that the same must be filed with the clerk of the city and county of New York; and it is only from the time the receiver receives a copy of the order, certified by the county clerk that he has any power to act at all. The judge in an order appointing a receiver has no authority to direct an assignment of personal property; and in respect to debts owing to the judgment debtor, can only forbid any transfer or other disposition of them until an opportunity be given the receiver to sue. (*People* agt. *Hurlbert*, 5 *How. Pr. R.*, 446; 9 *N.Y. Leg. Observer*, 245.) Motion granted.

SUPREME COURT.

BELL V. LITTLE, appellant agt. MARTIN WILLETTS, respondent.

The statutes of 1860 and 1862 do not enable a married woman to acquire title to property by gift from her husband. The statutes of 1848 and 1849 expressly disclaim this mode of creating a sole and separate estate in the wife. And the statutes of 1860 and 1862, do not enlarge the means by which such estate may be created, but declare the qualities of such estate when acquired in accordance with existing laws.

No gift *inter vivos*, confers title, unless the change of possession be positive, and the donor in no position to repossess himself of the subject matter of the gift, or to recall the same.

Kings General Term, February, 1869.

Before J. F. BARNARD, GILBERT *and* TAPPEN, *Justices.*

APPEAL from a judgment entered upon the report of Wm. P. Buffett, referee.

The action was brought by Bell V. Little against Martin Willetts, under sheriff of Suffolk county, to recover the possession of certain articles levied on by him, under an execution against the property of Robert H. Little, her husband.

The other facts in the case sufficiently appear in the report and opinion.

The referee found as facts:

1. That the plaintiff, Bell V. Little, is, and for more than seventeen years has been the wife of Robert H. Little.

2. That for fifteen years previous to and including the year 1865, her said husband was accustomed to give her each year a holiday gift in money—in some years $500, in other years $300.

3. That excepting portions of this money used in paying for articles purchased for herself, she delivered the same to her husband, with directions that he should invest the same for her and as her agent.

4. That he did invest and re-invest the same, together with the profits thereof, in various gold, petroleum, and oil stocks. He kept in his books an account between him and her of these transactions. Mrs. Little was kept advised of these transactions, made occasional memoranda of some of them, but kept no accurate account of the whole.

5. That in the Spring of 1866, Mrs. Little became the owner of a farm at Huntington, Suffolk county, on which she and her husband and family then went to reside, and where they have since resided.

6. That in 1866, Mrs. Little purchased and placed on the farm, through the agency of her husband, the following articles mentioned in the complaint, viz: the skeleton wagon, the two-seat wagon, the calash-top wagon, the bay horse, the cow, grindstone, and flat boat. Her husband in purchasing these articles professed to act in behalf of his wife, and paid for them out of the funds above mentioned. The calf mentioned in the complaint was raised from the cow mentioned. The hay and stalks mentioned were grown upon the farm.

7. That in 1867, Daniels, Crozier & Coe obtained a judgment in the supreme court, against Robert H. Little, on which an execution was issued; and the defendant, under sheriff of Suffolk county, by virtue thereof, levied on the articles mentioned in the complaint.

8. That the articles were immediately replevied by the plaintiff.

9. That the value of the articles, other than the hay and stalks, is $460, and of the hay and stalks, $40.

And as conclusions of law:

1. That by the common law, Robert H. Little, had no power to confer upon his wife, the plaintiff, a title to his money by a delivery thereof into her possession in the form of a gift, and that she had no legal capacity to acquire a title to such money in that manner.

2. That the statutes of the state have not altered the law in this respect.

The statutes of 1848 and 1849 expressly disclaiming this mode of creating a sole and separate estate in the wife. And the statutes of 1860 and 1862 not enlarging the means by which such estate may be created, but declaring the qualities of such estate when acquired in accordance with existing laws.

3. That the money delivered by Robert H. Little to his wife, the plaintiff, remaining by force of law his property, the proceeds thereof, and the articles purchased therewith, with the calf raised from the cow thus purchased, were all his property; and that the facts raise no equity in behalf of the plaintiff herein which can countervail the claims of an execution creditor of the owner.

4. That the defendant had authority to take those articles, and that he therefore have judgment for the return thereof, or in default of a return, for the sum of $460, with interest from the date of the replevy, to wit: from the 24th of January, 1868.

5. That the plaintiff was the owner of the hay and stalks mentioned in the complaint, and that she have judgment for six cents damages for the taking and detention thereof.

Judgment being entered for the defendant in accordance with the report, the plaintiff appealed to the general term.

HENRY C. PLATT *and* C. C. EGAN, *for appellant.*

I. No fraud is alleged in the answer, nor was any proven on the trial.

1. The fact of the married relation existing between this plaintiff and Robert H. Little raises no presumption of fraud. Her right to own, hold and dispose of property, separate from her husband, is the same as if she were a *feme sole.* The acts of '48, '49, '60 and '62 were not in-

tended to enable married women to hold property jointly with their husbands, but to take, hold and dispose of property, as if they had no husbands. (*Goelet* agt. *Gori*, 31 *Barb.*, 314.)

2. The creditors of the husband (Daniels, Crozier & Coe) were not *existing* creditors at the time he made these holiday gifts to his wife, nor at the time the plaintiff purchased the articles in suit. Their claims accrued a long time afterwards.

Gifts and voluntary conveyances made by the husband to the wife, without fraudulent intent, at a time when he is indebted to no one, are not to be called in question by his *subsequent creditors.*

3. A subsequent indebtedness cannot be invoked, to make that fraudulent which was honest and free from impeachment at the time. (*Philips* agt. *Wooster*, 36 *N. Y.*, 414; *and cases there cited by* PARKER, *J.*

4. A husband or other party, who is solvent, may make a voluntary transfer to, or settlement upon his wife or child, and such transfer or settlement is good against all the world, except *existing* creditors. (*Dygert* agt. *Remerschnider*, 32 *N. Y.*, 648).

5. In this state, ever since the case of *Seward* agt. *Jackson*, (8 *Cow.*, 406), the rule established there has been fol lowed in all the courts, that a subsequent creditor must show *actual fraud*, before he could set aside a voluntary settlement. (*Id.*).

6. The fact that the husband acted as her agent in the transaction of her business, raises no presumption of fraud.

Under the existing statutes, a married woman may manage her separate property through the agency of her husband, without subjecting it to the claims of his creditors.

The application of an indefinite portion of the income to the support of the husband, does not impair the title to her property.

No interest in her separate estate is acquired, either by the husband or his creditors, through his voluntary services as her managing agent. (*Buckley* agt. *Wells*, 33 *N. Y.*, 518).

II. No fraud upon these creditors being alleged or proven the gifts of Robert H. Little to his wife were valid, both in law and in equity; and the property levied upon in this action, by the defendant, was and is the property of the plaintiff; and the referee erred in his conclusions of law to the contrary.

1. The gifts were made perfect by delivery and acceptance. The plaintiff had entire control of them; and, with the profits and proceeds arising out of the investment of those gifts, purchased the articles in suit.

2. These gifts were not prejudicial to any rights of Crozier, Daniels & Coe. *They were not then creditors of the husband.* The husband was entirely solvent, for aught that appears in the evidence.

3. The gifts made to her by her husband were reasonable and proper, under the circumstances. They were evidently intended to be perfect conveyances—to vest in the wife a full possession, control and title to the monies given, as a voluntary settlement and separate property. Her separate investment of these funds, and the keeping of her accounts separately, shows this fact. The gifts were followed by an immediate and continued change of possession, and a separate enjoyment of profits and benefits arising therefrom. The agency of her husband was lawful and proper.

4. There was never any attempt of the husband to disturb this separate title, possession and enjoyment, or in any manner to interfere with his wife's exclusive rights thereto. He acted as her agent, when authorized and directed by her so to do.

III. The gifts were valid in law.

1. The rule of the common law, which treats a conveyance from husband to wife as void, is solely a technical re-

sult from the necessity of two parties to a contract, while, at common law, husband and wife are one person. (1 *Blackstone Com., p.* 442.) This, in the language of Justice POTTER (*Dygert* agt. *Remerschnider*), "is the crude, harsh old rule of the common law." The modern advance, both in this country and in England, of a more reasonable, wise and just view of the separate and independent rights existing between husband and wife, both in legislation and in the courts, amounts to a repudiation of that despotic rule, originating in the dark ages, that a wife, neither in her person or estate, had any legal existence. The unseen wisdom, says POTTER, J., of these oracular utterances of black letter common law, I am happy to say, no longer obscures the jurisprudence of this state.

2. Since the acts of '48, '9, '60, '62, husband and wife are two separate and distinct persons, as to holding and acquiring property, real or personal.

3. A wife may make a gift of her separate property to her husband. (*Gage* agt. *Duchy*, 28 *Barb.*, 622; *Shirley* agt. *Shirley*, 9 *Paige*, 363).

The same rule would, by analogy, apply to the husband, making gift to the wife. (*See Borst* agt. *Spelman*, 4 *N. Y.*, 284).

These acts are to be liberally construed in favor of married women. (*Power* agt. *Lester*, 17 *How. Pr.*, 413).

4. Under the statutes relating to married women, the common law rule that a wife cannot take by gift from her husband is *abrogated*. (*Rawson* agt. *Penn. R.R. Co.*, 2 *Abb. Pr. R.*, (*N. S.*), 220).

(*General term, first district, February*, 1867. *See decision there given.*)

IV. The gifts were valid in equity.

1. The referee erred in finding as a conclusion of law, "that the facts raise no equity in behalf of the plaintiff therein, which can countervail the claims of an execution

creditor, &c." The facts in this case warrant the exercise of the equitable powers of the court.

2. No fraud alleged or shown.

3. Gifts made *years* prior to any claims of creditors on husband.

4. Husband solvent and in good financial standing.

5. The distinction between legal and equitable remedies no longer continues since the Code. The legislature has united law and equity to the fullest extent, and its constitutional power to do so is firmly settled. (21 *How. Pr.*, 296).

6. Since the Code, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defense; but whether according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.—JOHNSON, J., (*Crary* agt. *Goodman*, 16 *N. Y.*, 268).

7. This idea of the union and identity of husband and wife does not prevail in courts of equity. (2 *Story Equity Jurisp.*, § 1, 368, 72, 73, 74, 75).

8. The rights of married women form a favored head of equity jurisdiction; and courts of equity are sedulous to protect them in their dealings concerning property. (2 *Story Eq. Jurisp.*, § 1, 429).

9. The intervention of a trustee is no longer deemed essential to sustain the wife's equitable rights under an agreement or conveyance from a husband to his wife. (2 *Eq. Jurisp.*, § 1, 380; *Wallingford* agt. *Allen*, 10 *Peters U. S. C. R.*, 583; *Lynch* agt. *Livingston*, 6 *N. Y.* (2 *Seld.*) *R.*, 422).

10. A court of equity also recognizes the relationship of debtor and creditor between husband and wife. The wife may in equity recover her debt out of his estate after his death. (2 *Story Eq. Jurisp.*, § 1, 373; *Gardner* agt. *Gard-*

ner, 22 *Wend.*, 526; *Devin* agt. *Devin*, 17 *How. Pr. R.*, 514).

11. The separate property of a wife, in respect to which a court of equity will regard as a *feme sole*, may also be acquired directly from her husband as a gift, and wholly created after coverture, without any consideration whatever. (*Slanning* agt. *Styles*, 3 *Picrre Wms. R.*, 338; *Calmady* agt. *Calmady*, *same*, 339); *Ryder* agt. *Hulse*, 24 *N. Y. R.*, 379).

12. The language of the courts of equity for the last century and over, shows a uniformity of principle as to sustaining rights of married women.

a. Lord Chancellor HARDWICKE, in the case of *Lucas* agt. *Lucas*, 1 *Atkins R.*, 271, says; "In this court, gifts between husband and wife have often been supported, though the law does not allow the property to pass."

b. Lord Chancellor ELDON, in the case of *Arundel* agt. *Phipps*, 10 *Vesey R.*, 148, says: "It appears to have been asserted that a husband and wife could not, after marriage, contract for a transfer of property from the husband to the wife, or trustees for her. *The doctrine is not so either here or at law.*

c. Chancellor KENT, in the case of *Shepard* agt. *Shepard*, 7 *Johns. Ch. R.*, 60, says: "I conclude that the deed from the husband to the wife ought in this case to be aided and enforced by this court." Sustaining a direct conveyance of real estate from husband to wife.

d. Judge WAYNE, in the case of *Wallingford* agt. *Allen*, 10 *Peters U. S. C. R.*, 594, says: "Where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use, equity will sustain it, though no trustee has been interposed to hold for the wife's use."

e. Vice-Chancellor MCCOUN, in the case of *Neufville* agt. *Thomson*, 3 *Edw.. V.-C. R.*, 93, says: "In equity, gifts to the separate use of a married woman, as well those presented by the husband, as those presented by third persons,

with or without the intervention of trustees, expressly named, will be protected in cases where they have been made in good faith, and the rights of creditors are not infringed."

THOS. YOUNG, *for respondent.*

I. The money paid for the articles recovered by the defendant belonged to Robert H. Little the husband of the plaintiff.

The purchase, therefore, was the purchase of the husband, and the property was amenable to an execution against him.

1. At common law a married woman was incapable of taking anything by gift from her husband, except by will. (1 *Black. Comn.*, 442).

2. This incapacity has not been removed. The statutes of 1848 and 1849 only enable her to take by gift, &c., from any person other than her husband. (*Laws* 1848, *chap.* 200, *as amended by Laws* 1849, *chap.* 375).

3. The statutes of 1860 and 1862, do not remove that incapacity, nor was that their object. (*Laws* 1860, *chap.* 90; *Laws* 1860, *chap.* 90, *as amended by Laws* 1862, *chap.* 172).

a. Their purpose was, simply, to declare the qualities of the estate she then had, or might thereafter acquire, and to enable her to sue, and be sued, in reference to the same. They do not say from whom she may, nor from whom she may not, take. They neither increase nor diminish the number of those, from whom, by the laws of 1848 and 1849, she is enabled to take.

b. The language of the acts of 1860 and 1862, does not admit of any such construction as that put upon it, in the case of *Rawson* agt. *The Penn. R. R. Co.*, (2 *Abb. Pr. R., N. S.* 220).

Such general statutes are never understood to overreach

particular prohibitions, founded on special reasons, of policy, or convenience. (*White* agt. *Wager*, 25 *N. Y. R.*, 328).

II. The money was given the plaintiff by her husband before the passage of the act of 1862, whatever, therefore, may be the general effect of that law, as it is not retrospective, it does not affect that gift.

III. Robert H. Lit le had no capacity to *acquire* title by gift from his wife. (*White* agt. *Wager*, 25 *N. Y. R.*, 328); so also, he had no power to *confer* title upon her by gift. There is no language in the married woman's acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which the husband labored.

IV. For the reasons stated in the last three points, the plaintiff can *claim* only an equitable title to the money with which the said articles were purchased, or to the articles purchased therewith.

V. This is not a proper case for the equitable interference of the court in the plaintiff's behalf.

1. There is nothing in the nature of the action, nor are there any allegations in the pleadings, or facts, in the case, which call for such interference.

2. The money with which the articles in question were purchased came from the husband, and was handed back to him. He used it as his own, speculating with it on his own judgment, and receiving no compensation for his services. These facts are badges of fraud. (*Buckley* agt. *Wells*, 33 *N. Y. R.*, 518, 520).

It is evident from the whole testimony that the plaintiff, at the time. did not consider this money as her separate property; she kept no connected account of it, and seldom any written account. She had no regular settlements with her husband. It seems to have been an arrangement instituted and carried on by the husband only, and for some other purpose than that of bestowing, in good faith, a gift upon his wife. It is just to infer that he obtained credit upon the faith of this money. And under all

the circumstances of the case, the equity of his creditors, "Daniels, Crozier & Coe," though their debt matured after these pretended gifts; is plainly superior to that of his wife. *Sherman* agt. *Elder*, 1 *Hilt.*, 476).

VI. The equities of this case have been fully considered by the referee, before whom, on the trial, all the facts and circumstances appeared more fully than they can in the printed case, and he finds, as a conclusion of law, that the facts raise no equity in behalf of the plaintiff which can countervail the claims of an execution creditor of the owner."

1. This conclusion of law is sustained by the findings of fact.

But if not, the findings of fact necessary to sustain it will be presumed, as upon the evidence such findings would not be disturbed as unwarranted. (*Grant* agt. *Morse*, 22 *N. Y. R.*, 323; *Smith* agt. *Coe*, 29 *N. Y. R.*, 666, 670; *Brainard* agt. *Duning*, 30 *N. Y. R.*, 211; *Sinclair* agt. *Talmadge*, 35 *Barb.*, 603; *Union Bank* agt. *Mott*, 39 *Barb.*, 180, 184; *Richardson* agt. *Dugan*, 8 *Bosw.*, 207).

2. This conclusion seems somewhat like a finding of fact. If it be regarded as such, then it should not be interfered with; it is not clearly against the weight of evidence. (*Watson* agt. *Campbell*, 28 *Barb.*, 221; *Thompson* agt. *Wood*, 1 *Hilt.*, 93).

VII. Judgment should be affirmed with costs.

By the court, TAPPEN, J. The plaintiff is a married woman, and for a period of fifteen years, previous to, and including the year 1865, her husband had given her holiday gifts of money, amounting in the aggregate to about $15,000. These monies she instructed him to use as her agent; he did so use and invest them in various stock transactions, and kept a separate account thereof.

On a judgment against the husband, the defendant under sheriff made a levy upon a wagon, and other personal prop-

erty in June, 1867. This personal property was upon a farm of the plaintiffs' on which the plaintiff and her husband resided. The plaintiff brought this action of replevin, and claims that the property was purchased by her husband as her agent, with monies acquired as above stated, or with the increase or profits of such monies; that such property was in her possession and use upon the farm, and that her husband was solvent at the time of the purchase of the property. The defense is principally based upon the legal proposition that the wife could acquire no property by gift from her husband, and the referee before whom the case was tried, so found, and reported in favor of defendant. I do not, however, upon the facts of the case, assume that there was any gift—that is, a gift of any property of which the wife retained possession or control, or which was placed in such condition as to render it capable of being distinguished from other property of the donor.

I am not prepared to hold that a gift like the one in question, confers any title upon the wife, or would confer any title upon any other person as donee against third parties.

A different conclusion might be reached if it were a return of the wife's money to her, or if she retained some control of the property which is the subject of the gift, or if it were property capable of being distinguished, but to hold that a wife may immediately return to her husband, money that he had given her, with instructions to use it as her agent, and that she may maintain title to personal property upon the allegation that it was purchased by her husband as her agent with the proceeds or profits of those gifts is to leave the entire business community without suitable protection.

It does not appear but that in this case, the "agent" the husband, has all that his wife has entrusted to him, and can fully account to her therefor.

In respect to the separate account kept between them, the only account produced upon the trial, was one made by the husband's book-keeper, and commencing in June, 1865

The wife was a witness upon the trial and the husband was not called.

I have not thought it necessary to consider whether the creditor upon whose judgment and execution the levy was made, was a prior or subsequent creditor; nor does the question of the right of the wife in equity to have an account from the husband, need to be considered here—if her husband were simply her debtor, then his gifts did not constitute a separate estate, in the sense which is necessary to enable her to maintain this action. The appellant cites, *Dygert* agt. *Remerschnider*, (32 *N. Y.*, 548) in which the right of the wife was upheld, but in that case the wife had paid full value to the husband's creditors. The appellant also cites *Wallingford* agt. *Allen*, (10 *Peters U. S. S. C. R.*, 594), in which Judge WAYNE, says: "Where the husband is in a situation to make a gift of property to the wife, and *distinctly separates* it from the *mass* of his property for her use, equity will sustain it, &c." I hold the latter feature to be wanting in this case.

No gift *inter vivos* is sustained as conferring title unless the change of possession be positive, and the donor in no position to re-possess himself of the subject matter of the gift, or to recall the same. The legislation in this state referred to upon the argument, does not enlarge the plaintiff's rights or remedy.

The statutes of 1848, '9, enable a married woman to take by gift, &c., from any person other than her husband, and the subsequent acts of 1860, '62, declare the nature or qualities of the estate which married women may acquire, and enable them to sue, &c., and these acts do not in terms or by implication designate the husband as a person from whom the wife might take, &c.

Judgment should be affirmed with costs.

N. Y. SUPERIOR COURT.

THE PEOPLE *ex rel.*, JAMES J. RICE agt. THE KEEPER OF THE PENITENTIARY OF THE CITY OF NEW YORK.

The laws of 1840 (*page* 73, *ch.* 100) and the laws of 1856 (*p.* 251, *ch.* 158) in connection with the Revised Statutes, recognize and authorize imprisonment in three different places for the crime of *grand larceny*, viz: state prison, penitentiary and house of refuge. Offenders over twenty-one are to be imprisoned in the state prison; those between twenty-one and sixteen, in the state prison or penitentiary at the discretion of the court; those under sixteen in the state prison or house of refuge, at the discretion of the court.

When the court under its power of discretion has determined the age of the offender, and designated the place of his imprisonment, and passed sentence upon him, the exercise of that discretion and that determination is made the final adjudication of a competent court, and can no more be inquired into on *habeas corpus* than can the guilt or innocence of a prisoner who has either pleaded, or been found by the jury, guilty of the offense charged in the indictment.

If error is committed in such determination it can only be corrected, if at all, by writ of error or a motion for a new trial, when the court has power to entertain such motion.

Special Term, September, 1869.

THE relator having been indicted in the court of general sessions, and brought up for trial therein, pleaded guilty of petit larceny from the person of Emily C. Cuyler, of goods, &c., of Richard M. Cuyler. He was thereupon sentenced by that court to be imprisoned in the penitentiary of the city of New York for the term of three years, and a record of the judgment of the court was thereupon made, as follows:

At a court of general sessions of the peace, holden in and for the city and county of New York, at the city hall of the said city, on Thursday, the twenty-first day of May, in the year of our Lord, one thousand eight hundred and sixty-eight.

Present—The honorable ABRAHAM D. RUSSELL, city judge of the city of New York, justice of the sessions.

The People of the State of New York agt. *James J. Rice.* On conviction by confession of petit larceny from the person of one Emily C. Cuyler goods, &c., of one Richard M. Cuyler. Whereupon it is ordered and adjudged by the court that the said James J. Rice, for the felony aforesaid, whereof he is convicted, be imprisoned in the penitentiary of the city of New York for the term of three years.

The relator now, on a petition setting forth that at the time of his sentence and conviction he was only of the age of fourteen years and twenty-nine days, and was at the time of said conviction unattended by counsel, and did not know his age or understand his rights, has obtained a writ of *habeas corpus*, and asks for a discharge from his imprisonment.

The return to the writ shows that the relator is held under the aforesaid judgment of the court of general sessions.

There was no proof offered on the return being made to the writ contesting the above mentioned facts contained in the petition.

JONES, J.—The Habeas Corpus Act provides that if the imprisoned party is detained in custody by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued on such judgment or decree, he shall be remanded to such custody.

If then the said judgment of the court of general sessions is a final judgment of a competent court of criminal jurisdiction the prisoner must be remanded.

That it is the final judgment of a court of criminal jurisdiction is not disputed. But it is urged that the court was not competent to render the judgment in question for two reasons:

1. That the offence to which the relator pleaded guilty amounts to petit larceny only, the punishment for which cannot exceed six months imprisonment, and a fine of $100;

and, therefore, the court had no power to order an imprisonment for three years.

2. That the court had no power to direct any imprisonment in the penitentiary in this case.

First—Chapter 374 of the laws of 1862, enacts that a larceny committed by stealing, taking, and carrying away from the person of another, may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars.

The punishment for grand larceny is imprisonment not exceeding five years.

The offence to which the relator pleaded guilty is the stealing and taking from the person of another property of less value than twenty-five dollars.

Under the act of 1862, the punishment for this offence may be the same as the punishment for grand larceny, which is imprisonment not exceeding five years.

The court, therefore, ordered no greater term of imprisonment than the law prescribes.

Second—That the court of general sessions had jurisdiction to indict, try, convict, and sentence for the offense in question; that it has in some cases authority to order imprisonment in the penitentiary, and that it had jurisdiction over this particular offense, and the person of the offender, are matters that are not disputed. But it is claimed that as its authority to imprison in the penitentiary for the offense in question, extends only to persons between sixteen and twenty-one years of age, it has no power so to imprison any others, and that consequently its judgment so imprisoning one not between these ages is not the judgment of a competent court.

This seems to me to be a *non sequitur*. If the court had no authority to order imprisonment in the penitentiary in any case, or if it appeared on the face of its record that the person so ordered to be imprisoned was not within the prescribed ages, then I am strongly inclined to the opinion that

it might well be said that the court was not competent to render such judgment, and necessarily that the imprisonment was not under the judgment of a competent court. But it is unnecessary to pass on that question as it does not arise in this case.

The general punishment prescribed for all classes of offenders convicted of the offense in question, is imprisonment in the state prison for a term not exceeding five years (2 *R. S.*, 1*st ed.*, *p.* 679).

In 1840 the legislature enacted that, "Whenever any person under the age of sixteen years, shall be convicted of any felony or other crime, the court *instead* of sentencing such person to imprisonment in the state prison or county jail *may* order that he be removed to and confined in the house of refuge, established by the society for the reformation of juvenile delinquents, in the city of New York, unless notice shall have been received from said society that there is not room in said house for the reception of further delinquents." (*Laws of* 1840, *p.* 73, *chap.* 100.)

In 1856, the legislature enacted that, "Whenever any person under the age of twenty-one and above the age of sixteen, shall be convicted of an offense punishable with imprisonment in the state prison in either of the judicial districts of this state having a penitentiary within said judicial district, the court before which said conviction shall be had may, *in its discretion*, sentence the person so convicted to imprisonment in the penitentiary, situated in that judicial district." (*Laws of* 1856, *p.* 251, *chap.* 158.)

The effect of these two acts is to enable the court, in its discretion, to exercise leniency in favor of youthful criminals in the selection of the place of imprisonment, leaving the maximum term of imprisonment the same as that prescribed by the Revised Statutes for all persons liable to punishment for grand larceny.

These acts taken in connection with the Revised Statutes, recognize and authorize imprisonment in three different

places for the crime of grand larceny, viz., state prison, penitentiary, and house of refuge; offenders over twenty-one are to be imprisoned in the state prison; those between twenty-one and sixteen in the state prison or penitentiary, at the discretion of the court; those under sixteen in the state prison or house of refuge, at the discretion of the court.

The place of imprisonment is to be designated by the court in which the prisoner is convicted. In order to enable the court to make such designation, it must, before passing sentence (which is the judgment of the court), pass on and determine the age of the offender. The very vesting this discretion in the court gives it power and renders it competent to determine the question; when that determination is made it is the final adjudication of a competent court, and can no more be inquired into on *habeas corpus* than can the guilt or innocence of a prisoner who has either pleaded, or been found by the jury, guilty of the offense charged in the indictment.

If error is committed in such determination it can only be corrected, if at all, in the same manner as errors in admitting or rejecting evidence, in charging or refusing to charge the jury,or rendering verdicts on insufficient evidence; and that manner is by writ of error or a motion for a new trial, when the court has power to entertain such motion.

Writ discharged and prisoner remanded.

NEW YORK COMMON PLEAS.

RICHARD D. BRINCKERHOFF, appellant agt. THE BOARD OF EDUCATION FOR THE CITY AND COUNTY OF NEW YORK, AND THE SCHOOL OFFICERS OF THE NINETEENTH WARD, impleaded with THE MAYOR, &c., OF NEW YORK, and others.

Under an execution upon a judgment against a *municipal corporation*, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment. (*Following the case of Darlington* agt. *Mayor, &c., N. Y.*, 31 *N. Y.*, 164; *S. C.* 28 *How.*, 352).

But if there is no such property, the remedy is by *mandamus* to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor is placed in the same condition as are the creditors of the state or of the United States.

This rule applies to judgments under the *mechanic's lien law*. Therefore, under that statute a lien cannot be acquired for work done or materials furnished towards the erection of a *public school-house*, erected in accordance with the provisions of certain laws of the state relating to the city of New York, and which is devoted by these laws to a public use.

And no such security can be obtained under the mechanics lien law, upon property, which, for reasons of public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions.

General Term, June, 1869.

Before DALY, F. J., BRADY *and* BARRETT, *Judges.*

THE action was brought to foreclose a lien in favor of a sub contractor upon a public school-house in 42d street, in the city of New York.

The contract for the carpenter's work was between the school officers, approved by the board of education, and William Goulter.

The plaintiff furnished the sash and glass doors for the building, under a contract with Coulter, in pursuance of, and in conformity with, Coulter's contract.

The referee found that the plaintiff had performed work, and furnished materials to the full amount of his lien, to-

wards the erection of the school building, under a contract with Coulter, the contractor, and in conformity with and in pursuance of the contract for the erection of the building, and that there was a balance due the contractor more than sufficient to cover the lien.

But he found, as a conclusion of law, that owing to the peculiar provisions of the contract, no valid lien could be put upon the building, in favor of Coulter, the contractor, or of any sub-contractor.

BENJAMIN G. HITCHINGS, *for plaintiff.*

I. The conclusion of law which the referee found, and upon which he based his judgment, is erroneous.

By referring to the opinion of the referee, it will be seen that he came to this conclusion upon the ground that the contract provided that the payments under it should be made by drafts drawn and countersigned by officers of the board of education upon the chamberlain of the city, and that a fund having been raised by taxation for the erection of this school building, and the contractor having agreed to receive payment by drafts on this fund, he has waived his right to a lien, and that, therefore, the sub-contractor can have none. (*Opinion of referee, contract art. 6th.*)

1. The provision of the contract, that payment should be made by drafts on the city chamberlain, signed by certain officers of the board of education, and countersigned by other officers of the same board, was merely a provision prescribed by the statute to prevent frauds by making these officers checks upon each other. Its effect upon the rights of a sub-contractor is no different from that of a provision to pay by checks on a bank, or to pay in cash.

There is nothing in it tending to affect the right of a contractor, or of sub-contractors, to acquire valid liens upon this building.

If the proper officers should refuse to give the drafts, when the contractor became entitled to payments, or if the drafts, when given, should turn out unproductive, why could not the contractor enforce a lien as well as if the contract had been simply to make the payments in money.

Clearly these drafts where intended by both parties to be equivalent to money, and by agreeing to take them, the contractor waived none of his rights.

If the contractor had agreed to take the note of a third person in absolute payment, it would have presented a very different question, but even in that case, it would be difficult to maintain that a sub-contractor could not acquire a valid lien. It would seem that the utmost which the owner could claim in that case would be that upon giving the note of the third person for the benefit of the lien holders, his building be discharged of liens.

But, in this case, the agreement was in substance that the board of education would pay by checks on their own bankers.

This court have decided, in a well considered case, which has never been doubted or called in question, that the lien law extends to and covers school buildings in the city of New York. (*McMahon* agt. *The School Officers of the 10th Ward*, 12 *Abb.*, 129).

The reasoning of the referee is entirely unsound, and has no logical tendency whatever to support his conclusion.

In the first place he labors to show that the contractor having agreed to take pay by drafts could not maintain an action, but would have to resort to mandamus; and he cites certain cases where mandamus was held to lie in very peculiar cases, but they have no relevancy to this case.

Whether the remedy of the contractor would be by action or by mandamus, does not affect the question of his right or that of the sub-contractors to the liens which are given by the statute.

Again, the referee argues that the taxpayers may have contributed the money to pay for the building, and yet it may be sold to satisfy liens.

But the owners cannot be compelled to pay, by reason of all liens, more than the contract price, and if they fail to pay the contractor or to satisfy the liens of subcontractors, what answer is it either to a contractor or subcontractor that the money to pay him or them has been raised by taxation and has or has not been squandered by the agents or officers of the owners?

Again, the referee says, that by agreeing to take pay in drafts, the contractor waived his right to any lien, and he cites certain cases (*Trust* agt. *Pirson*, 1 *Hilt.*, 292, *and others*) which recognize the well settled principle in relation to common law liens upon chattels for work done upon them, that by parting with the possession or giving time for payment, the lien may be waived.

These cases are entirely inapplicable to any question upon mechanics' liens on buildings under the statute, and besides, in this case, there was no agreement to give time, nor any provision in the contract inconsistent with a lien.

In this case, why should not the contractor or subcontractor have the lien which the statute gives for work and materials upon the building? True, they agree to give him drafts, but they may not give them or they may turn out unproductive. Again, the contractor may not pay his subcontractors, and why should they be deprived of the security which the statute gives them?

II. The ground upon which the defendants themselves have put their defense is equally untenable.

They set up in their answer, that by the fifth article of the contract it is provided that the contractor shall not suffer any liens to be put upon the building, and that any such lien, until it is removed, shall preclude any claim for payment under the contract; and insist, that such liens having been filed, they are not only discharged from liability to make

payments to the contractor, but that the liens of subcontractors are void.

1. The plain and obvious meaning of the clause in the contract is, that if liens are put upon the building the contracting parties shall not be obliged to pay the contractor until such liens are removed, because otherwise, besides paying the contractor they might be compelled to pay the liens.

It cannot be pretended that the contract provides that liens so put upon the building shall be void; but the provision implies that they may be obliged to pay them.

2. The argument is, that whilst liens are existing upon the building nothing can be due to the contractor on the contract, and therefore the liens are void. This is the merest and weakest sophistry. The existence of liens does not prevent anything from being *due to the contractor*, it only precludes him from the right to recover what is due to him, whilst lienholders stand in a position of being able to compel payment of their liens, out of what is due to him.

The argument, that the owners are not bound to pay the contractor what comes due to him under the contract, because there are liens, and that the liens are void because they are not bound to pay the contractor, is very unreasonable if not absurd.

3. If the contract had provided that there should be no liens upon the building in favor of subcontractors, or that such liens should be void, such a provision in the contract would be in direct contravention of the statute, and would be void.

4. The only limit to the liability of owners to liens is that they shall not be compelled to pay more, by virtue of all liens, than the contract price of the building, and they cannot be compelled to pay again what they have actually and *bona fide* paid to the contractor in pursuance of the contract before the filing of liens—but they cannot abrogate

and annul the lien law and make void all liens by simply inserting a clause in the contract intended to produce that effect.

The above points cover the whole ground upon which the referee decided the case—but there is yet another objection to a recovery by plaintiff which it may be proper to consider.

III. The objection taken by the answer of the Mayor, &c. of the city, that plaintiff had not presented the claim upon which his lien is founded, to the comptroller, pursuant to the act of 1860, is not well taken.

1. It was not such a claim as comes within the intent and meaning of the act.

It was not a claim against the city, but against William Coulter.

It would have been absurd to present it to the comptroller; he could not adjust it or settle it.

The amount or validity of plaintiff's claim under his lien is of no interest to the city, even as owner of the building. It can be enforced only to the amount that is due the contractor. Neither the city nor its financial officer the comptroller, is the party to pay for the school building, or to settle what is due to the contractor, under his contract.

The object of the law was to prevent the city from being put to costs, which might be saved by a settlement of the claim. But the plaintiff's lien and the foreclosure of it could put no costs upon the city, unless they come in and unnecessarily litigate against a just claim. There is no need of their defending separately from the board of education in any event.

The object of plaintiff's lien, and the foreclosure of it is merely to get from the board of education, what is due to him from Coulter, out of what they owe to Coulter—the city is a necessary *formal party* only, but has no real interest in it.

If it was necessary to present the claim of plaintiff to the comptroller at all, it would seem that it should have been presented twenty days before filing the notice of lien, for that was the commencement of the special proceeding.

Russell agt. *The Mayor*, (1 *Daly*,262), was a claim against the city for pecuniary damages.

2. This provision of the statute is purely for the benefit of the city, and can be waived. It must be taken advantage of on the first opportunity, or it will be considered as waived. (*Russel* agt. *The Mayor*, 1 *Daly*, 262).

In case of a special proceeding, the allegation required by the statute must appear in the *moving papers*. (*See act of* 1860). The first moving papers in this case were the notices to come in and interplead. On the return of that notice the counsel for the city consented to an order that plaintiff serve a complaint, &c. They should then have moved to dismiss the proceedings, for non-compliance with the statute, if they intended to insist upon it.

3. If such an allegation was necessary in the complaint, the objection for the want of it should have been raised by demurrer, or by motion to dismiss.

As it was an objection appearing upon the face of the complaint, it could not be taken by answer. (*Voorhie's Code*, § 148, *note a.*).

IV. The judgment upon the report of the referee should be set aside, and a new trial granted, and as there is no question upon accounts, it should not be sent again to a reference.

ABRAHAM R. LAWRENCE, JR., *for board of education, &c.*,

I. The plaintiff, appellant showed no cause of action against the defendants, the board of education, the school officers of the ninteenth ward, or the mayor, aldermen, and commonalty of the city of New York.

II. The claimant under the mechanics' lien law, must show, before he can have a judgment, that work has been done for which the owner is *actually liable*, according to the *terms* of his *contract* with his *contractor* for the erection of the building. (*Cunningham* agt. *Jones*, 3 *E. D. S.*, 651; *Pendleburgh* agt. *Mead*, 1 *E. D. S.*, 728; *Spaulding* agt. *King*, 1 *E. D. S.*, 717; *Doughty* agt. *Devlin*, 1 *E. D. S.*, 626; *Cronk* agt. *Whittaker*, 1 *E. D. S.*, 647; *Nolan* agt. *Gardner*, 4 *E. D. S.*, 727).

a. In other words, the claimant can have as against the owner only the rights and claims at the time of the filing of the notice to foreclose the lien under section 4th of the act of 1851, *which are possessed by the original contractor*, and unless such facts are established as would in a proper action entitle the original contractor to recover against the owner, the claimant cannot have judgment for the foreclosure of his lien.

b. Now, in this case it cannot be pretended that Mr. Coulter, the original contractor, could maintain an action on the contract against these respondents.

The referee has found, that in addition to the alleged lien of the appellant, there were liens against the building in question filed prior thereto, in favor of White for $1,964.15, and $380; and in favor of Menzies and others for $536.38, making an aggregate of $2,880.53, and that said liens were in suit at the time this action was tried.

By the 5th section of the contract it is provided that "any lien, attachment, or other incumbrance, *until it is removed, shall preclude any and all claims* or *demands for any payment whatever under or by virtue of this contract.*"

Clearly, then, Mr. Coulter could have no right of action against these respondents until these liens were removed.

How, then, if the decisions above referred to, and numerous others to the same effect which are not here cited, are to stand, can it be said that the appellant can succeed in this proceeding?

Any construction of the contract, which would enable a lien creditor to enforce his lien, strikes from the contract one of its most important provisions, and instead of placing such lien creditor in the same position as the original contractor, would give to him other and greater rights.

c. That this court has always drawn a distinction between the fact whether work had been done and money earned, and whether money had *become payable* under the original contract, is shown clearly by the case of *Spaulding* agt. *King*, 1 *E. D. S.*, 717.

In that case the court held that the claimant must show, before he could maintain his action against the owner, that payments have *beeome due under the contract with the owner.* (*And see cases supra.*).

III. The filing of the appellant's own notice of lien was a bar to any action against the respondents, either by Coulter or any party who did work or furnish materials for the building in question under him: because by the very terms of the contract between Coulter and the school officers, nothing was to be *due*, nor was any claim or demand to be *payable* to him, until such lien was removed. (*Contract, section* 5).

a. It has been shown under the second point, that the lien creditor must prove that under the original contract monies have not only been *earned* by the original contractor, but that they must, under the contract, be also *payable to* him.

In *Doughty* agt. *Devlin*, 1 *E. D. S.*, 626, it was held that "the owner cannot be required to pay money to the claimant *before it becomes payable*, according to the *owner's contract*, for the erection of the building."

The court also held, "that when an owner had contracted with another to build a house, all sub-contractors and others furnishing labor or materials to the contractor, *must, so far as they rely upon the owner or his house* as security under the mechanic's lien law, be deemed to do so in *subordination*

to the owner's contract, and upon the *credit* which the *terms of such contract offer for their reliance.*"

If a recovery could be had in this case, Mr. Brinckerhoff could not be deemed to hold his rights against the building in question, in *subordination* to the contract between Coulter and the school officers; because, by that contract, no money became *payable to Coulter until the appellant's lien, and all other liens, were removed.*

If the apppellant possesses any such rights as he claims here, they are *paramount* to the contract between the school officers and Coulter, instead of being *subordinate* to it.

In Cronk agt. *Whittaker*, 1 *E. D. S.*, 647, the court held that "the owner cannot be required to pay money to the *claimant* before it *becomes due to the contractor.*"

Clearly no money is due to Mr. Coulter, under the contract, until it is *payable.* If a man gives his note for $1,000, payable in three months after date, it cannot be said that the $1,000 is due to the payee until the three months have expired. So here no money becomes due to the contractor until the lien is removed.

In fact, the provision in the 5th section may be regarded as a term of credit given by the contractor to the owner.

IV. The respondents were obliged to and did expend the sum of three thousand two hundred and seventy dollars to finish the building in question, after Coulter abandoned it.

This amount was $800 more than the amount claimed to be due to Coulter for the fifth and sixth payments under the contract as modified.

In any action which Coulter might have brought against the respondents, this expenditure would have defeated a recovery by him under the rule laid down in cases above referred to. (*See Smith* agt. *Ferris* 1 *Daly*, 18).

V. The respondents also insist that the liens filed by White and Menzies, amounting to the sum of $2,880.53, independently of the provisions of the 5th section of the contract, bar and preclude the enforcement of any lien

which the appellant might otherwise have, until such liens are disposed of.

VI. The building in question being a part of the public property of the mayor, aldermen, and commonalty of the city of New York, and having been expressly acquired for *educational purposes*, the provisions of the "act for the better security of mechanics and others erecting buildings and furnishing materials therefor, &c." passed July 11, 1851, as amended April 13, 1855, do not apply. (*Darlington* agt. *Mayor, &c.*; *opinion of Denio, C. J.*, 31 *N. Y., p.* 164).

VII. The appellant was not entitled to a judgment for the foreclosure of his lien, because he had not presented the claim on which it was founded to the comptroller of the city of New York for payment or adjustment, or complied with the provisions of the act, entitled "An act in relation to actions, legal proceedings, and claims against the mayor, aldermen and commonalty of the city of New York," passed April 14, 1860. (*Laws of* 1860, *p.* 645.)

a. The title to the building in question is vested in the corporation of the city of New York, by the "Act to amend, consolidate and reduce into one act, the various acts relative to common schools in the city of New York," passed July 3, 1851. (*Davies' Laws, p.* 1057, *Sec.* 25.)

The provisions of the act of 1860 embrace *all actions and special proceedings* against the mayor, &c., and of course a proceeding of this character. As the fee of the property is in the city, and these respondents are but trustees, if a judgment for the foreclosure of the alleged lien of the appellant cannot be had against the owner, for the reason aforesaid, it follows that no such judgment can be given against the trustees.

b. The objection above referred to is specifically taken in the answer of the mayor, &c.

VIII. The appellant was not the real owner in interest of the claim or demand for which the lien was filed at the time

the proceedings to foreclose his lien were initiated, nor at the trial of this action.

This point was made in the answer of the respondent, Coulter, and, as the claimant, a subcontractor can have no judgment against the owner of the building, unless he is entitled to a judgment against the contractor for whom he did the work, it is competent for the respondents to avail themselves of that objection.

IX. By the terms of his contract, Coulter agreed to receive, in payment for the work to be performed and the materials to be furnished by him, *drafts payable to the order of the person entitled to receive them*, drawn upon the chamberlain of the city of New York, signed by the president and clerk of the board of education, and countersigned by the chairman of the finance committee of the said board.

The referee was right in holding under these circumstances that a special fund having been raised by taxation for the erection of this school building, and Coulter, the contractor, having agreed to receive payment by drafts on this special fund, he could not by action against the mayor, aldermen and commonalty of the city, or the board of education or the school officers, reach the general property of the city, or this school building in particular. (*Baker* agt. *City of Utica*, 19 *N. Y. R.*, 326).

X. The case of *McMahon* agt. *The Tenth Ward School Officers* (12 *Abb., p.* 129), is not in conflict with the views expressed in the respondent's sixth and ninth points, for the reason that the grounds taken in those points were not urged in that case.

XI. The respondents also contend that the assignment made by Coulter to Foster for the sum of three hundred dollars entitles them to add that amount to the sum they are entitled to deduct from the amount which would have been due to Coulter on account of the fifth and sixth payments under the contract.

a. The respondents had notice of such assignment and were bound by it. This assignment was made and was filed with the clerk of the respondents, long before the appellants' lien was filed.

XII. Again, the order given to White by Coulter, dated November 14, 1862, for $1,500, amounted at least to an equitable assignment of so much of the fifth and sixth payments, and White thereby acquired a specific equitable lien upon such payments for the amount of such order. (*Bradley* agt. *Root*, 5 *Paige*, 632; *Cowperthwaite* agt. *Sheffield*, 1 *Sand.*, 417; *Yeates* agt. *Grover*, 1 *Vesey*, *p.* 280.)

a. The intention of Coulter to appropriate the amount of fifteen hundred dollars out of those instalments is apparent on the face of the order, and that is the test by which we are to be governed in construing the effect of the order.

b. There was no necessity for a formal acceptance of the order by the board of education, in order to give it effect in favor of White.

c. Besides, Boese, the clerk of the board, did accept the order on the part of the board.

His testimony shows that he followed his usual custom as *ex officio* treasurer of the board. He placed the order with the contract, so that when the instalments to which it related became due it should be paid. (*Beers* agt. *Phœnix Glass Co.*, 14 *Barb.*, 358.)

XIII. In order that the court may see at a glance precisely how the respondents' account with Coulter stands, the respondents present the following figures for its inspection.

Amount expended to finish building when abandoned by Coulter	$3,270.69
Amount of draft in favor of White, Nov. 14, 1862	1,500.00
White's first lien	1,964.15
White's second lien	380.00
Menzies' lien	536.36

Foster's order.....	300.00
Total.....	$7,951.20

All the above liens and claims of White, Menzies and Foster were filed and arose prior to the appellants' alleged claim.

XIV. There is no error in the judgment entered on the report of the referee, and it should be affirmed with costs.

By the court, DALY, F. J., I expressed the opinion in *Mc Mahon* agt. *The Tenth ward school officers, &c.*, (12 *Abb.*, 129), that a party who performed work towards the erection of a public school house in the city of New York, had a lien upon the building, which could be enforced under the acts for the better security of mechanics and others erecting buildings, or furnishing materials therefor in this city (*Laws of* 1851, *ch.* 513; *of* 1855, *ch.* 404). But the point was not taken in the case, nor necessarily involved, as the judgment was reversible upon other grounds. Assuming that a lien could be acquired, in the notice of lien filed in that case, the board of school officers, the board of education, the mayor, aldermen and commonalty of the city, were alleged to be the owners of the school-house, and the notice to foreclose it was served upon each of these bodies.

At the hearing, the referee dismissed the complaint, upon the ground, that the mayor, aldermen, &c., were the owners of the building; that the contract was made with the board of school officers, and with the board of education, who were not the owners nor the agents of the owners, and that consequently, there was no contract with the owner of the building, in pursuance of which the plaintiff, who was a subcontractor, could acquire any lien. The point to be determined, therefore, was, assuming that a lien could be acquired, whether the referee was right in holding that the notice was defective in alleging that the board of school officers and the board of education were, in conjunction

with the mayor, aldermen, &c., the owners. This, as the case came before us, was the only question presented, and, in conformity with a previous adjudication of this court, affirmed by the court of appeals, in *Loonie* agt. *Hogan*, 5 *Seld.*, 440), to the effect that the one for whom the building is erected, and who is to pay for it, though he has not the legal title, but only an equitable interest in the land, is the owner, we held that these three bodies, having distributed between them all the rights and powers which the owners of such a building could possess, were, for the purposes of the lien law, to be deemed collectively the owners. I, individually, was of the opinion that they were within the equitable design of the lien law. My colleagues, Judges BRADY and HILTON, gave no opinion; they simply concurred in reversing the judgment; and my own opinion upon the point stated was expressed without the examination which I have given to it, now that it is distinctly raised, and must be passed upon. It is sufficient, therefore, to say that we are not, under the rule of *stare decisis*, precluded by anything decided in *McMahon* agt. *The School Officers*, from considering and deciding whether under the statute a lien can be acquired for work done, or materials furnished towards the erection of a public school-house, erected in accordance with the provisions of certain laws of the state relating to this city, and which is devoted by these laws to a public use. (*Laws N. Y.*, 1851, *p.* 749, §§ 28, 10, 25, 27; of 1853, *p.* 635, §§ 14, 2, 11; *of* 1854, *p.* 241, § 10.)

Since the decision in the case of *McMahon* agt. *The School Officers, &c.*, the court of appeals, in *Darlington* agt. *The Mayor of N. Y., &c.*, (31 *N. Y. R.*, 164), have considered the question how far a judgment against the city can be enforced by a levy upon and sale of property belonging to, or held in trust by it, as a municipal corporation. Chief Justice DENIO, by whom the opinion of the majority of the court was delivered, held that a muncipal, equally with a private corporation, may have its property taken in

execution, if payment of a judgment is not otherwise made; but he distinguishes as exempt from the exercise of this right, such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture, or or naments, or the public parks, or grounds, or such as may be legally pledged for the payment of its debts. These, he holds, cannot be seized to satisfy a judgment, as these structures are public property devoted to specific public uses, in the same sense as similar structures are, in use by the state government, and, though this is a distinction which appears to have been taken for the first time, it is one, that when the purposes, for which municipal corporations existing are created, are considered, commends itself as founded in public necessity.

It is said, in *Cuddon* agt. *Fastwick*, (1 *Salk.*, 193; *Holt*, 433; 6 *Mod.* 123), that a municipal corporation is properly an investing of the people of the place with the local government thereof. Chancellor KENT applies to such bodies the characteristic appellation of "local republics," and says more particularly afterwards, "they are created by the government for particular purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the people of the state." (*Kent's Com., vol.* 2, *p.* 304.) To which it may be added, that they are allowed, as has been repeatedly said, to assume some of the duties of the state, and enjoy property and power for that purpose, as auxiliaries of the government and trustees for the people. (*McKim* agt. *Odoer*, 3 *Bland's Ch. R.*, 417; *Angell and Ames on Corporations*, *Introduction*, § 18; *Darlington* agt. *The Mayor*, *&c.*).

Municipal corporations came into use in England in the form of boroughs, through an arrangement by which certain managers of the local community undertook to pay the

yearly rent or sum due to the superior or sovereign, in consideration of which they were permitted to levy the old duties, and were responsible for the funds committed to their care. This privilege of farming their tolls or duties, was afterwards confirmed to them by acts of incorporation embracing other privilleges, either gradually acquired or long enjoyed in places where the Romans had introduced the municipia, or cities enjoying the local right of self-government. (*Thompson's Essay on Municipal History, pp.* 10, 11, 12; *Palgrave's Anglo Saxons, pp.* 6, 11; *Millar's English Government. p.* 340; *Angell and Ames on Corporations,* §§ 16, 18, 21).

Having thus the right to collect duties, and being responsible for the funds coming into their hands, it came to be recognized, very naturally, that they might on the one hand, sue to enforce the payment of duties, and, on the other, be themselves sued to compel them to discharge the obligations they had assumed. As their municipal authority and duties gradually increased, the power to bring actions, and their liability at the suit of others, was both increased and varied. Actions by and against them are to be found as early as the *Year Books,* and the power was generally conferred specifically in the acts of incorporation; but the works of authority are barren of exact information as to the manner in which judgments against them were enforced, which may have arisen from the fact that they rarely refused to pay a judgment when recovered against them, and were always able, from the nature of their powers, to procure the means to discharge it.

In *Rex* agt. *Gardiner,* (*Coup.,* 86), Justice ASTON says: "As to the remedy of levying a duty upon a corporation, the books all agree that it may be levied, but they differ as to the mode." But he was speaking only to the question whether a private corporation (that is, a college) could be rated for the support of the poor of a parish. It is probable that a municipal corporation might, as was held in the

case of private and trading corporations, be compelled to appear, or obey decrees for the payment of money after execution issued by the common law process of *distringas*, under which the lands and goods of the corporation could be distrained, and, in the event of non-compliance, sequestrated. (*The Master and Wardens of the Company of Wax Chandlers*, *Skin.*, 27; *The African Co.*, *id.*, 84; 1 *Ver.*, 121; *The East India Co.*, 2 *id.*, 396; *Precs. in Chy.*, 129; *The Hamborough Co., of Merchant Adventurers*, *Cases in Chy.*, 204).

The right, however, to recover a judgment against them, would necessarily carry with it the right to enforce the payment of it. But the mode of enforcing it, so far as I have been able to find, is by no means clearly indicated.

ROLLE, C. J., in the case of the *Town of Colchester*, (*Styles*, 267), says: "If a sum of money be to be levied upon a corporation, it may be levied upon the mayor, or upon any person being a member of the corporation." And in another case, in *Styles*, 366, the court ordered a *distringas* to levy a fine of twenty pounds, imposed after indictment, upon the inhabitants of a parish, for not keeping a bridge in repair. But I do not find in the early Abridgments of *Fitzherbert*, *Brookes*, or *Sheppard*, nor in that great repository of the common law adjudications, *Viner's Abridgment*, nor in the English treatises which I have examined, anything to indicate that judgments against municipal corporations ever were, or could be enforced by the seizure and sale of buildings or other property of the corporation devoted to public objects, such as jails, poor houses, markets, court houses, and other structures necessary in the local government of the place, and indispensible to enable a municipal corporation to carry out the purpose for which it is created.

There are three cases, of comparatively recent origin, all relating to the borough of Poole, a small seaport town in the south of England, in which, or in one of which, this right appears to have been recognized; but the point was

not involved, and it is apparent from the report of each case, that in no one of them was the question examined, or so deliberately considered or passed upon, as to entitle it to the weight of an adjudication upon this point. This will appear from a very brief statement of these cases.

In the year 1837, the mayor, aldermen, and burgesses of the borough of Poole, being indebted to their town clerk for his services, gave him their bond for £4,500, payable in installments. The first two installments remaining unpaid, he obtained a peremptory mandamus to compel the corporation to enforce payment out of the existing borough rates, or to collect another rate to pay the two installments, which the corporation having failed to do, he applied for an attachment, which was refused. It appears to have been conceded, from the report of the case, that a mandamus would lie to compel the corporation to levy a tax, if there were no other means of enforcing the payment of the debt; but the attachment was denied, because by the 5th and 6th of *Wm.* 4 *Ch.*, 76, the employees of a municipal corporation are to be paid out of the borough fund, and not out of that portion of it which consists of rates, which the mandamus obtained required the corporation to pay, out of the existing or any future rates, thus specifying the means by which payment was to be obtained, and leaving the corporation no option to resort to any other, there being no allegation in the mandamus that the corporation had no other fund from which payment might be made (*Regina* agt. *Ledgard*, 1 *Adolph. and El. N. S.*, 616).

The town clerk afterwards obtained a judgment against the corporation upon the bond, and sued out an *elegit*, or process under which the lands of the defendant in a judgment may be given into the possession of the plaintiff, and held until the judgment is satisfied out of the rents and profits of the land, or it is paid by the defendant when the land is restored to him. He sought under the *elegit* to obtain possession of the town hall and markets, with the

view, I suppose, of having the tolls of the latter applied to the payment of the judgment, but being unable to get possession, he brought ejectment. The corporation applied to defend, without confessing that they were in possession, upon the ground, that their property, under the 5th and 6th *Wm. 4 Ch.*, 76, was applicable to public purposes only, and could not be taken upon execution. The court refused the application, upon the ground that the corporation would not be prejudiced in such a defense, whether it was available or not, by admitting possession. Lord DENHAM, C. J., declaring, however, that the court did not wish to be understood as giving any countenance to the supposition that the corporate property, although directed by the statute to be applied to public purposes, and not to the private benefit of the members of the corporation, was protected from the lawful claims of persons having demands upon the corporation (*Doe ex dem. Parr* agt. *Roe*, 1 *Adol. and El., N. S.*, 700).

This was expressing a very decided opinion upon the point, but it is apparent, as I have said, that the question was not examined or so deliberately considered as to give to the case much weight, especially when, as will be shown hereafter, there has been an express adjudication in this country to the contrary.

In 1843, the corporation leased their market house, with the customs and tolls, to one Whitt, for the period of three years, at an annual rent, subject to two mortgages, which had been given in 1822. The town clerk having sued out his *elegit* before the lease was given, called upon Whitt to pay rent to him or that he would turn him out, which Whitt did, and attorned to the town clerk without the privity of the corporation. The corporation having sued Whitt for the rent due upon the lease, he set up his eviction by the town clerk, and the possession of the town clerk upon his *elegit;* but the corporation recovered the rent, the court holding that the right of immediate possession was in

the mortgagees, and that the town clerk could not enter nor acquire any title under his *elegit*, the corporation having nothing to which the *elegit* could apply, except the legal right to the reversion, which was a very remote one, the mortgage being given for one thousand years (*The Mayor, &c., of Poole* agt. *Whitt*, 15 *M., and Wells.*, 571).

In this last case, no question appears to have been raised, either by the counsel or the court, as to whether the town clerk would, or would not, have had the right to take possession of the market under the *elegit* if there had been no mortgage, which is the only aspect in which the case has any bearing, and it is not to be regarded as of weight upon a point not inquired into, the more especially as it would seem from the decision of the cases, that the town clerk could be paid only out of the borough fund (*The Queen* agt. *Ledgard, supra*), and that his proper remedy was to compel it by mandamus (*The Queen* agt. *The Mayor of Stamford*, 6 *Adol. & El., N. S.*, 433; *Jones* agt. *The Mayor, &c., of Carmarthen*, 8 *M. & W.*, 605; *Tapping on Mandamus*, 93; *Wilcox on Municipal Corporations, p.* 356.)

Chancellor KENT, in declaring that municipal corporations can sue and be sued, remarks that the judicial reports of this country abound with cases of suits against towns in their corporate capacity for debts and breaches of duty, for which they are responsible; but he says nothing as to the mode in which judgments against them in such actions can be enforced (2 *Kent*, 275, 4*th ed.*), and the question is one upon which the authorities in this country are by no means agreed, for in some instances it has been held that their property cannot be taken on execution issued upon a judgment against them (*Chicago* agt. *Halsey*, 25 *Ill. R.*, 595); while in others it has been held that it can, or the right to take it has been impliedly recognized. (*Crafts* agt. *Elliottville*, 47 *Maine*, 141; *Darlington* agt. *The Mayor, &c., supra.*)

In the first of these cases (*Chicago* agt. *Halsey*, 25 *Ill. R.*, 595), it was held by the supreme court of Illinois, that upon a judgment against a municipal corporation the corporate property cannot be seized and sold under execution; that the proper remedy is mandamus to compel a levy of taxes sufficient to enable the corporation to pay the judgment. The superior court of Chicago having refused to set aside an execution issued upon a judgment against the city, the supreme court of the state, upon appeal, reversed the decision of the court below, and directed it to enter an order quashing the execution.

"It is true," says BREESE, J., "that by the charter of the city it can sue and be sued, but it is not an inference that, if sued, and a judgment passes against it, an ordinary writ of *fieri facias* can issue, under which its corporate property can be seized and sold. Nor is there any necessity for such writ. On a debt being ascertained by judgment against a city and a refusal to pay it, a mandamus can issue to compel payment, or to compel a levy of taxes sufficient to discharge the judgment," closing with the remark, "We decide this on principle."

It may be collected, as the result of this examination, that, under an execution upon a judgment against a municipal corporation, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment; that *if there is no such property*, the remedy is by mandamus, to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor of the municipal government is placed in the same condition as are the creditors of the state, or of the United States.

Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the

same reason, be equally exempt from the operation of the lien law, unless it appears by the law itself, that property of this description was meant to be included.

There is nothing in the lien law that would warrant this inference. A lien is given by the act for labor performed, or materials furnished on the building, altering, or repairing of any house or other building, upon the building and the lot of land upon which it stands, to the extent of the right, title, and interest of the owner at the time when notice of the claim was filed and served. The object of the act was to give mechanics and material men a security for the ultimate enforcement of their claim, by making it from the time that notice of it as provided is given, a lien or incumbrance upon the property benefited. Where the lien thus attaches, either party may bring the claim to a final determination, and if anything is ascertained to be due to the claimant, judgment is entered for the amount of it, which judgment may be satisfied by the sale of all the right, title and interest, which the owner had to the property when the notice of the claim was filed and served.

When judgment is recovered in a court of record, it is a lien upon the real estate of the defendant, from the time when the lien is docketed; and when recovered in courts not of record, it becomes a lien upon the filing of the judgment in the office of the county clerk. In these cases, it is enforced as a lien only from the time of the docketing of the judgment or the filing of the transcript; but the judgment obtained by foreclosure under the lien law may be enforced as a lien against the particular property from the time of the filing and service of notice of the claim, and that constitutes the particular benefit which it was the design of the act to confer upon the laborer or material man, and is the advantage which it gives him, over ordinary creditors, as a security for the payment of the judgment he may ultimately obtain. With this exception, the judgment

he obtains is, by the express language of the act, "to be enforced in all respects in the same manner as judgments rendered in all other civil actions for the payment of money." (*Laws of N. Y.*, 1851, *p.* 955, § 8). And if judgments recovered in other actions cannot be enforced against a certain kind of property, for the reason that it is exempt from seizure and sale, upon grounds of public necessity, neither can a judgment under the lien law. which is a mere foreclosure of a security obtained by the filing and service of notice of a claim (*Cronkright* agt. *Thomson*, 1 *E. D. Smith*, 661; *Nott's New York Lien Law*, *p.* 63). And no such security can be obtained upon property, which for reasons of public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions.

I think the fair construction of the lien law is, that the security contemplated by the law may be obtained upon the building upon which the labor was bestowed or the materials furnished, and upon the lot of land upon which the building stands, if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise. That we are not justified in holding that the legislature meant that this particular kind of creditor should have a lien upon public edifices and the right to sell them to satisfy his claim, unless the legislature has expressly said so. The reason which exempts such structures. upon the grounds of public necessity, applies as forcibly in this case, as in that of any other judgment creditor, and if all other judgment creditors are precluded from the exercise of such a right he must be considered precluded also, in the absence of any provision that would warrant us in holding that the legislature designed that his case should be an exception to the operation of a general rule, having its foundation in public necessity.

The erecting and maintaining of school houses in this city for public education, is imposed as a duty upon the city

by statute. Their erection, maintenance and government is regulated by numerous statutory provisions. They are by law devoted to a public use, and therefore come within the operation of the rule above considered.

Judgment affirmed.

I dissent, G. C. BARRETT, J.

N. Y. SUPERIOR COURT.

ROBERT P. DODGE and GEORGE F. MCCLELLAN, assignees, &c., plaintiffs and respondents agt. THE NEW YORK AND WASHINGTON STEAMSHIP COMPANY, defendants and appellants.

Newly discovered evidence, upon which to found a motion for a new trial, must not only be *material*, but must have been discovered *since the trial.*

The defendants, on appeal, cannot insist that a third person was a partner with the plaintiffs and interested in the subject matter of the litigation, where they did not raise that issue by their answer.

It is no ground of error, for which a judgment can be reversed on appeal, that the court below, on motion, refused to allow a witness to be recalled for the purpose of giving a new piece of evidence claimed to have been discovered *since the evidence was closed*, on the trial, on the preceding day, and of the existence of which the moving party claimed to have been ignorant.

This question should be tested by the same rules, which would have to be applied to the decision of a motion for a new trial, on the ground of the dicovery of this evidence after the final determination of the trial, if such had been the case.

General Term, May, 1869.

APPEAL from the judgment entered upon the verdict rendered, and from an order denying the defendants' motion for a new trial on the judges minutes, and

Appeal from an ordor made at special term, denying defendants' motion for a new trial, on the grounds of surprise and newly discovered evidence.

The facts are disclosed by the opinion of the court.

EMERSON *and* GOODRICH, *attorneys for plaintiffs and respondents.*

STORRS *and* SEDGWICK, *attorneys for defendants and appellants.*

By the court, FREEDMAN, J. The motion made at special term by the defendants for a new trial, on the ground of surprise and newly discovered evidence, was properly de-

nied. The fact that the witness Rhinehart testified at the close of the trial, that to his recollection no such conversation had taken place as had been testified to by Thomas Clyde, the president of defendants' company, cannot have operated as a surprise upon the defendants. Nor can the evidence, which the defendants claim to have discovered, be considered as such newly discovered evidence, on account of which a new trial is sometimes granted. Such evidence must not only be material, but must have been discovered since the trial. In the present case the evidence referred to, if discovered at all, was discovered before the trial had been completed, and the case submitted to the jury; and if any error has been committed in excluding the evidence, it was committed during the trial.

The order of the special term should therefore be affirmed, with ten dollars costs.

I have also carefully examined the grounds of appeal from the judgment, which are relied upon by the defendants, and am of opinion that no error was committed on the trial which entitled the defendants to a new trial. The action is brought by the assignees of Morgan and Rhinehart to recover a commission of five per cent. on the earnings of the steamer "Salvor," from April 6, 1864, to June 15, 1865, claimed by Morgan and Rhinehart as a compensation for their services in effecting, as shipbrokers and commission merchants, and acting as agents of the defendants in that behalf, a charter of the said steamer to the United States government. The questions addressed to Thomas Clyde, the president of defendants company, whether Morgan and Rhinehart were paid five per cent. commission for procuring charters of other vessels in which *he* was interested, were asked on the cross-examination of Mr. Clyde, one of the principal witnesses of the defendants, and it was a matter of discretion with the justice presiding at the trial to allow them or not. Error does not lie for the exercise of that discretion.

The evidence offered by the defendants to prove that there was a third partner in business in the firm of Morgan and Rhinehart, as agents of the company, was rightfully excluded. No such issue had been raised by the pleadings. On the contrary, the answer of the defendants to the plaintiffs' amended complaint contained an express admission that "Thomas P. Morgan and George Rhinehart, in the years 1864 and 1865, were doing business in Washington, D. C., under the firm name of Morgan and Rhinehart, and were the defendants' agents in said city.

The second count of the answer contains an admission to precisely the same effect. Under the pleadings, as made by themselves, the defendants cannot be permitted to litigate the question of a defect of parties in the composition of that firm, as alledged.

Another point insisted upon by the appellants is, that the court below erred in refusing to permit the witness, Carlos P. Houghton, to be recalled for the purpose of proving certain admissions claimed to have been made to him by the witness Rhinehart concerning a certain conversation, which the defendants insist had taken place between said Rhinehart and the president of defendants' company. The evidence had been closed on the day preceding. Thomas Clyde, the president referred to, had testified that on or about the second day of March, 1864, he had a conversation with Rhinehart, in which he informed the latter that the company would not pay any further commissions on charters of vessels out of the line for government service, and that Rhinehart expressed his willingness to accede to it. At the close of the testimony, Rhinehart being called on behalf of the plaintiff, swore that no such conversation took place, *to his recollection.* Both parties thereupon rested; the case was closed and an adjournment had until the next day. Before leaving the court-room, however, Carlos P. Houghton, who had been examined as a witness for the defendants, informed defendants' counsel, and the president of the com-

pany, that he could prove that in the beginning of March, 1865 (he probably meant 1864), and immediately after the conversation between said Rhinehart and Clyde before referred to, Rhinehart stated to him in the office of said Morgan and Rhinehart, at Georgetown, that it was agreed that Morgan and Rhinehart were to have a salary as agents of the steamship company, instead of a commission. The next morning, at the opening of the court, the defendants' counsel made a motion to be permitted to recall the witness Houghton, for the purpose of giving this new piece of evidence, claimed to have been discovered since the preceding day, and of the existence of which the defendants claimed to have been ignorant.

The court, on plaintiff's objection, refused to give such permission, and proceeded to charge the jury. The question whether such refusal constitutes error, for which a new trial will be granted, should be tested by the same rules, which would have to be applied to the decision of a motion for a new trial upon the ground of the discovery of this evidence after the final determination of the trial, if such had been the case. The evidence is undisputed that the Salvor's charter was effected by Morgan and Rhinehart, on the 6th day of April, 1864, and that the defendants received the charter money from that day. There is sufficient evidence to show that up to May 28, 1864, the defendants' paid to Morgan and Rhinehart five per cent. commission on all charters of vessels, in or outside of their regular line, and also upon a vessel chartered to the government by Morgan and Rhinehart on the day preceding the charter of the steamer Salvor. The president of the defendants' company, Thomas Clyde, testified, on his direct examination, that he had the conversation referred to with Rhinehart, on or about the 2d of March; but, on his cross-examination, it turned out that on that day a meeting of stockholders took place in New York, where there was some conversation about dismissing Morgan and Rhinehart; that the said president

asked the directors of the company to withhold action until he could get an answer from Morgan and Rhinehart, and that about a week afterwards he went on to tell them of what he calls the "determination of the company" to tell them "that they were going to be dismissed unless there was a change in the programme," and to induce them, if possible, to accept a salary of $3,000 in lieu of future commissions.

It appears, however, sufficiently, upon the whole evidence, that no definite mutual understanding was arrived at for some time. On the 27th of April following, the company passed a resolution declining to pay any more commissions, and the matter finally resulted in a new agreement between the company and Morgan and Rhinehart, whereby the former allowed to the latter $3,000 in lieu of future commissions, and bought from them their lease of the wharf, their sheds, engine and other wharf improvements, for the price of $4,446.90. This agreement, according to the testimony of the same president, and the testimony of the secretary of the company went into effect on July 1,1864, and from that day the company paid all the expenses of clerk-hire, &c., &c., which had previously been paid by M. & R.

Up to that time, however, with the exception of an isolated transaction (steamer Rebecca Clyde, May 28), in respect to which the parties agreed specially that no commission should be charged, and which, as Morgan swears, was the first intimation his firm had that the company had actually declined to pay further commissions, the parties must be assumed to have stood upon their old and reserved rights, especially as all the witnesses of the defendants have negatived the idea that still another mode of compensation was ever agreed upon for the period of time intervening between the 2d day of March and the 1st day of July, 1864; and because, as I have before stated, the fact stands out in bold relief, that Morgan and Rhinehart effected on the 5th of April, 1864, the day preceding the charter of the Salvor, a

charter of the steamer Baltimore for the defendants to the government; and, at the completion of the charter party, to wit: the 28th of May, 1864, were allowed by the defendants a commission of five per cent. The charter party of the Salvor did not end until the 15th of June, 1865, and Morgan and Reinehart, before the expiration of that time, were neither bound nor in a position to claim their commission on her account. Therefore, considering this question in the light most favorable to the defendants—considering Rhinehart as something more than an ordinary witness, as a party whose declarations and admissions are evidence against the assignees of his firm, assuming the defendants' motion for permission to recall the witness Houghton, to have been made in perfect good faith, I cannot perceive how his additional statement could become material.

The offer was, merely to prove by him that sometime in March, 1865 (probably 1864), Rhinehart stated to the witness "that it was agreed that Morgan and Rhinehart were to have a salary as agents of the steamship company, instead of a commission;" but the proof thus offerred fell short in not showing when this new agreement was to take effect, whether it was intended to apply to all charters, or only to the charters of vessels in the regular line, or to what charters in particular, and how it was to affect charters procured before the day upon which it was to go into effect, &c. I therefore do not think, that in consequence of the exclusion of this proposed additional evidence, the defendants were in anywise injured.

It was a matter resting in the sound discretion of the justice presiding at the trial, and would afford no ground for granting a new trial as a matter of right on application at special term after verdict, even if the said evidence had been discovered since the trial. Moreover, it appears that the defendants on the trial had previously rested three times before making that motion, that the same witness had been examined at great length upon other very important points,

and the affidavit of Thomas Clyde, the president, used on the motion for a new trial at the special term, further discloses, that prior to being reminded by Houghton, he was aware of the nature of the testimony said Houghton was willing to give upon this point, but that the circumstance had escaped his recollection. Under these circumstances, the exercise of the discretion of the justice presiding at the trial, in excluding this proposed additional testimony, should not be interfered with on appeal.

The remaining points relied on by the defendants being equally untenable, the judgment appealed from, and the order denying the defendants' motion for a new trial on the judges' minutes, should be affirmed with costs.

BARBOUR, Ch. J. I concur.

FITHIAN, J. I concur.

N. Y. SUPERIOR COURT.

JAMES F. TRUFANT agt. JOHN E. MERRILL and another.

Where an action between partners, is brought for a dissolution of the copartnership, and the defendants, on application for a receiver, are permitted in lieu thereof to give their own bond pending the litigation conditioned to manage and take care of the property and to account, &c: On report of the referee appointed in the action finding that the plaintiff is entitled to judgment dissolving the copartnership:

Held, that the assets must go to pay debts, and the surplus, if any, to the respective parties. It is necessary, therefore, to convert the assets into money, and the usual mode to do that is through a *receiver*. Upon his appointment the assets must go into his possession and the condition of the defendants' bond will be satisfied.

In the condition of the action, the referee could not *state the accounts;* and it was proper to leave that to be done on the coming in of the receivers account, showing the amount to be distributed.

A referee, who has made his decision and submitted his report, becomes *functus officio*, and cannot again act without being set in motion by the court.

General Term, June, 1869.

This action was to obtain a dissolution of the copartnership of the plaintiff and defendants, and a distribution of the partnership assets. Pending the action, the defendants, on an application for the appointment of a receiver, were allowed, in lieu thereof, to give a bond conditioned that they should manage and take care of the property of the firm during the action and render a true and faithful account thereof whenever required by the court, and should pay and deliver to the parties who might be adjudged to be entitled thereto all such property as the court might order to be paid and delivered. A referee was appointed to hear and determine all the issues. In his report and decision he found that the plaintiff was entitled to judgment dissolving the partnership, but that he could not state the accounts between the parties, for the reason that there was no evidence as to what proportion of the debts would prove good and collectable, or of the value of the lease or of the good will of the business; and he directed that a receiver be appointed

to take possession of the assets of the firm and dispose of the same; and after paying the debts to retain the remainder, subject to the further order of the court.

On the 4th of May, 1869, an order was made to show cause why judgment should not be entered on the referee's report, and a receiver appointed. On the 10th of May, another order was made to show cause why the referee's report should not be sent back to the referee, with directions to determine all the issues.

On the hearing upon such last-mentioned order, it was ordered that it be sent to a different referee to take and state the accounts.

From this order the plaintiff appealed.

T. B. ELDRIDGE, *for appellant.*
R. H. CHANNING, *for respondents.*

By the court, MONELL, J. The motion was merely that the report be sent back to the referee who made it, with directions to decide all the issues. It was probably supposed that he was bound to state the accounts between the parties, and that until he did so he had not determined all the issues. If that view was correct, the order substituting or appointing a new referee should not be reversed, merely on the ground that no reason was assigned for the change, or that it was giving more than the moving party asked for. The referee first appointed, having made his decision, became *functus officio*, and could not again act without being set in motion by the court; and it was not, therefore, incompetent for the court to appoint a new referee.

But I am of opinion that it was not necesary, and therefore not proper, to either send the report back or to appoint a referee in the present state of the action, to take the account between the parties.

The assets of the firm, consisting of debts due, the lease

of Washington Hotel, and the good will of the business, were in the possession or under the control of the defendants, and until they were accounted for, or disposed of, could not be made available to the plaintiff; nor could the referee ascertain their value, or give any direction for their distribution. The bond given by the defendants, in lieu of a receiver, authorized a retention of the partnership property only during the pendency of the action. Upon adjudging the partnership dissolved, the assets must go to pay debts, and the surplus, if any, to the respective parties. Therefore, it is necessary to convert the assets into money, and the usual mode is to do that through a receiver. Upon his appointment the assets must go into his possession, and the conditions of the defendants' bond will be satisfied.

In the condition of this action, therefore, the referee could not state the accounts; and it was proper to leave that to be done on the coming in of the receiver's account, showing the amount to be distributed.

Had the action been tried by a justice of the court, he would, after adjudging the partnership dissolved, have appointed a receiver, with directions to dispose of the assets, and report the surplus to the court, to the end that a referee might then state the accounts between the parties, and the court direct the distribution. Such a course of proceeding would be regular. The referee, in this case, has not done otherwise, and the order appealed from was premature, and should not have been made.

The order should be *reversed*, with costs to the appellant to abide the final disposition of the subject of costs in the action.

JONES and FREEDMAN, JJ., concurred.

Order reversed.

COURT OF APPEALS.

CALVIN DAY and others, appellants agt. THOMAS P. SAUNDERS, respondent.

Where a party takes negotiable paper before its maturity, in payment of a debt *past due*, it constitutes him a holder for value.

Consequently, where the plaintiff held four notes of the maker—two of which were not due and two past due, on receiving an indorsed note of the same maker in payment for the full amount of the four notes, *held*, that the evidence as to the indorsed note being received in payment of the two notes past due, being precisely the same that it was in regard to the notes not due, the plaintiff was entitled to recover the full amount of the indorsed note—the note in suit—being the amount of the four notes.

January Term, 1867.

APPEAL from a judgment of the supreme court, at general term, affirming a judgment at special term, upon a verdict rendered for plaintiff for part of his claim upon a promissory note.

POMEROY *and* SOUTHWORTH, *for appellants.*
BROWN *and* BEACH, *for respondent.*

DAVIES, Ch. J. On the 2d of November, 1859, the plaintiffs were the owners and holders of four promissory notes made by one J. H. Whipple. The whole amount due thereon for principal, interest, and protest fees, was on that day $1,031.25. Two of the notes were over due, upon which suits had been commenced by the plaintiffs against Whipple, and on the said 2d of November, plaintiffs agreed to accept Whipple's note for the amount of said four notes, at forty-five days, to be indorsed by the defendant Saunders. On the 22d of November, 1859, plaintiff's attorney received the note in suit indorsed by Saunders, delivered up to Whipple his four notes, and Whipple paid said attorney's

costs incurred in the two suits, on the two over due notes of Whipple, amounting to the sum of $24.92, and gave a receipt therefor in these words: "Received payment November 22, 1859, and suit discontinued." Saunders indorsement had been obtained in blank, and to be used for a different and another purpose. On the trial, the court held that the plaintiffs were only entitled to recover to the extent of the amount of the two notes of Whipple, not due, at the time of the delivery of the note in suit to them, and that said plaintiffs were not *bona fide* holders of the note in suit, for the value or amount of the two notes of Whipple, which were over due. The plaintiffs had a verdict for the amount of said two notes not due, amounting to $239.65, which judgment on appeal to the general term was affirmed, and the plaintiffs now appeal to this court.

The supreme court was clearly correct in holding that the plaintiffs were entitled to recover against this defendant upon the note in suit, to the extent that they were *bona fide* holders thereof.

In *Van Duser* agt. *Howe*, (21 *N. Y.*, 531) this court decided that a party who entrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. But the court erred in holding that the plaintiffs were not *bona fide* holders of the two notes, over due, for the payment of which, the note in suit was equally received, as for the two notes not then due. The facts are indisputable that the note in suit was transferred in payment of the four notes of Whipple then held by plaintiffs. The facts in this case are not distinguishable from those presented in *Brown* agt. *Leavitt*, (31 *N. Y.*, 113). It was then stated, that the note in suit in that case was indorsed and delivered by persons composing the firm of Zebley & Co. to the plaintiff's testator, before it fell due, in payment, so far as it went, of a larger note then held by the testator and over due. It was received with other notes, and a bal-

ance in cash as such payment of the larger note, delivered up to Zebley & Co. We then said: "In this state it is settled by abundant authority that this transaction constituted the plaintiff's testator a holder for value of the note in question. A further discussion of the question might lead to a suspicion, that the law was in doubt on the point."

The judgment should be modified by increasing the amount of the verdict from $239.65 to the amount due upon the four notes, at the date of the verdict, and that judgment for that sum and interest thereon be affirmed, with costs.

If the parties cannot agree upon such amount, then the supreme court is directed to ascertain the same, and render judgment for the plaintiffs, with costs, accordingly.

GROVER, J. The exception taken by plaintiff's counsel, upon the trial to the charge of the judge as given, and to the refusal to charge as requested, present the only real question in the case. That question is whether a party taking negotiable paper before maturity, in payment of a debt past due, constitutes a holding for value. This precise question was decided affirmatively in *Brown* agt. *Leavitt*, (31 *N. Y.*, 113), by this court. In *Young* agt. *Lee* (2 *Kern.*, 551), the like rule was applied when the debt for which the note was taken had not become due. It is manifest that there is no distinction in principle between a case when the debt is due and when not due. These cases should put an end to the question in this state. The counsel for the respondent insists that the rule cannot apply to a case when the debt is due, for the reason that a new promise by a debtor does not satisfy or extinguish an existing debt. He overlooks the reason for the latter rule, that is, that such new promise is no consideration for an agreement to discharge the debt. It is nothing more than promising to do what the debtor is already bound to do.

In the present case there was a consideration, viz: the

additional security of the defendant's indorsement. The evidence in the present case proved that the note in suit was taken in payment of the four notes given up. The court so held as to the two small notes not due. The evidence as to the note in suit being received in payment of the notes past due was precisely the same that it was in regard to the notes not due, and the judge should have gone further, and upon the evidence, directed a verdict for the plaintiffs for the amount of the note in suit, that being the amount of the four notes for which it was given.

The judgment must be reversed and a new trial ordered, costs to abide event.

Reversed.

DIGEST

OF

ALL THE DECISIONS

CONTAINED IN THE FOLLOWING REPORTS:

37 Howard's Pr. R.; 51 and 52 Barbour's R.; 5 Abbott, N. S.; and 38 and 39 N. Y. R.

ABATEMENT.

1. An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff, for the tortious taking of assets, does not abate by the death of the plaintiff. The cause of action survives by virtue of 2 *Rev. Stat.*, 447. *(Emerson* agt. *Bleakley*, 5 *Abb. N. S.*, 350.*)*

ACTION.

1. Since the Code, the action formerly styled *indebitatus assumpsit*, lies to recover back money obtained or paid by actionable deceit, or false and fraudulent representations. *(Butler* agt. *Livermore.* 52 *Barb.* 570.*)*

2. And *it seems*, notwithstanding this remedy at law, the defrauded party may resort to a court of equity and recover his money back. *(Id.)*

3. An action cannot be maintained, either at law or in equity, against parties as sellers of stock, to recover back the price paid by the plaintiffs therefor, as stock of the defendants, for their use, on the ground of false and fradulent representations alleged to have been made by the defendants; where it appears that when the plaintiffs agreed to take the stock, they knew, or, at least, supposed and believed, they were dealing with the defendants as the agents of third parties to obtain *subscriptions* for stock in a new company, and did not suppose they were *purchasing*, or agreeing to purchase, stock of the defendants, but supposed they were paying the money to them for the use of their principals; and it also appears that where the defendants were, in fact, such agents, and the plaintiff's money was paid to, and received by them, not as sellers of the shares, but as subscription agents, for the use and benefit of their principals; and had been paid over to the latter, before suit brought, without notice or objection. *(Id.)*

4. Such an action must be regarded as an action on contract, and not as an action for a tort. It must be deemed an action to recover back the money paid, as so much money had and received by the defendants to and for the use of the plaintiffs, with interest, and not an action to recover damages for the alleged false and fraudulent representations, or for deceit. *(Id.)*

5. And should it be sent to the circuit for trial, it could not be tried there as an action to recover damages for obtaining the plaintiff's money for the use of the defendant's principals, or of the corporation, by means of the alleged false and fraudulent representations. And as the court cannot, on a trial at special term, without a jury, render a judgment against the agents for the money which they received of the plaintiffs, they having paid it over to their principals, the complaint will be dismissed. *(Id.)*

6. Remedies by, to be according to the course of the common law, and retroactive legislation requiring a cause of action to be submitted to a tribunal not proceeding according to the course of the common law is unconstitutional. *(In re Townsend*, 39 *N. Y. R.*, 171.) See same principle in *Hurst* agt. *Litchfield*, *id.* 377.

7. An enemy adhering to an organized force at war with the government of the United States is incapacitated from maintaining an action in the civil courts of this State. Open organized rebellion is war, and must be opposed and encountered like any other war, with the same precautions, operations, and avoidance of obstacles. *Sanderson* agt. *Morgan.* (39 *N. Y. R.* 231.)

ADMIRALTY.

1. By the act of Congress of July 29, 1850, a *mortgage of a vessel*, which is recorded in the *collectors office at the home port*—that is, the port where the owner resides, in pursuance of the provisions of the act, takes effect by its own force, and irrespective of the filing of the mortgage in the county clerk's office, and has preference over any subsequent purchaser or mortgagee. (*White's Bank of Buffalo* agt. *Robert Smith*. *ante*, 168.)

2. The cases of *Potter* agt. *Irish*, (10 *Gray*, 414) and *Chadwick* agt. *Baker*, (54 *Maine R.*, 9) holding that in order to protect the title of the purchaser or mortgagee of a vessel, under that act, it is necessary to record the bill of sale or mortgage in the office of the collector of customs at the *port of the last registry or enrollment*, though not the home port of the vessel, *overruled*. *(Id.)*

3. Congress having created, as it were, this species of property, (ships and vessels) and conferred upon it its chief value under the power given in the constitution to regulate commerce, there can be no good reason for entertaining any serious doubt, but it has the power to pass a *recording act* to protect the rights and title of all persons dealing in such property. *(Id.)*

4. Where two *steam vessels* are crossing each others courses—one having the other on her starboard side, being in plain sight of each other, in an open river at midday, in clear weather and no other vessels moving near them to affect in any way their action, it is the duty of the vessel standing on the starboard side to *keep on her course*, and the duty of the other to avoid her. (*Schuyler* agt. *Steamer Corsica*. *ante*, 262.)

5. The *master of a vessel*, has no lien on the freight nor on the vessel for his wages. The maxim that "freight is the mother of wages," has no relevancy or application whatever to the contract of a master for his compensation, as such. His contract is to be governed by its terms, and by the same rules which are applied to the construction of other contracts. (*Jenkins* agt. *Wheeler*, *ante*, 458.)

6. Where the master agreed with the owner to take charge of the vessel then lying at the port of New York, for her then present voyage to Australia and return to New York, according to instructions received, and the owner agreed to pay him $150, for each and every month of said period during said outward and return voyage—and during the voyage the vessel put into the port of Bahia, South America, for water, and again put into Cape Town on the coast of Africa, for water and fresh provisions; after leaving Cape Town, she encountered heavy winds and lost her rudder—leaked badly, when she was run into Port Louis on the Island of Mauritius, where she was abandoned to the underwriters, and the voyage abandoned:

7. *Held*, no fault being established against the master, that he was entitled to recover wages for the period during which he performed the service as master, to wit: from the time of the inception of the voyage, on the 8th of February, 1853, to the date of its abandonment and breaking up on the 8th of September, 1853." *(Id.)*

8. A proceeding against a steamer by name, authorized by laws of 1862, chapter 482, is a proceeding in the nature, and with all the incidents, of a suit in admiralty (*Bird* agt. *Steamboat Josephine*. 39 *N. Y. R.* 19.)

9. The District Courts of the United States are, by the Constitution and laws thereof, vested with exclusive original cognizance in all cases involving admiralty and maritime jurisdiction. (*Id.*)

10. State laws conferring jurisdiction in such cases upon state courts, are in conflict with the constitution and laws of the United States, and void. (*Id.*)

ADVERSE POSSESSION.

1. A conveyance is not to be held void (under our statute declaring a deed of land held in adverse possession void) on mere proof, that, at the time of such conveyance, the lands were in the possession of the defendant. (*Stevens* agt. *Hauser*. 39 *N. Y. R.* 302.)

2. It seems, that a conveyance by an assignee in bankruptcy, under the laws of the United States, made in pursuance of a sale by order of court, would not be void by force of our statute, even if the land was held in adverse possession. (*Id.*)

3. The act of congress, limiting the assignee in bankruptcy to two years within which to bring actions, has no application to a cause of action arising in his own favor for injury to property, or a disseizin of lands vested in him by the proceedings. (*Id.*)

4. A mere tort feasor cannot, in an action against him by such assignee or his grantee, impeach the title of the assignee by proof of irregularity in the proceedings in bankruptcy, or in the order of sale. (*Id.*)

AGREEMENT.

1. In an action for the breach, by the defendant, of an agreement to let a farm to the plaintiff for three years, each party to furnish part of the stock, seeds, tools, etc., the plaintiff to occupy and work the farm, and have certain specified supplies for his family, and all proceeds to be divided equally; the plaintiff is entitled to recover, as damages, the value of his contract, *i. e.*, what such a privilege of occupying and working the farm, subject to the conditions of the agreement and under all the contingencies which are liable to affect the result, is worth. (*Taylor* agt. *Bradley*. 39 *N. Y. R.* 129.)

2. And such damages may be recovered immediately upon the refusal of the defendant to perform the agreement. (*Id.*)

3. By parol, within the statute of frauds, ratified by subsequent partial payments. (*Bissell* agt. *Balcom*. 39 *N. Y. R.* 375.)

4. A stipulation in a written contract for building, &c., that, "in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect," is not binding, being against the policy of the common law, and having a tendency to exclude the jurisdiction of the courts provided with ampler means to entertain and decide legal controversies. (*Hurst* agt. *Litchfield*. 39 *N. Y. R.* 377.)

5. Where a special contract has been fully performed, and nothing remains to be done but to pay the money thereon, a complaint founded on the common counts, as *quantum meruit*, &c., is sufficient. (*Id.*)

ALIENS.

1. Naturalization, by virtue of the laws of the United States, has no retroactive operation to vest or confirm in the subject the title to lands which, by reason of his alienage, he could not inherit at the time of the death of the ancestor. (*Heney* agt. *Brooklyn Benevolent Society*. 39 *N. Y. R.* 333.

2. The statute passed April 10, 1843, section one, authorizing a naturalized citizen, to whom lands would have descended if he had been a citizen at the time of the death of the person last seized, to continue to hold the same in like manner as if he had been a citizen at the time of such descent cast, applied only to those who were then naturalized citizens. (*Id.*)

3. An alien may take land by grant, and hold it at the will of the state. (*Larreau* agt. *Davignon*, 6 *Abb. N. S.*, 367.)

4. The state cannot enter upon his possession until the alienism and escheat have been judicially established. (*Id.*)

5. By the common law, lands held by an alien on his death vest in the state. Otherwise, when a citizen holding lands liable to escheat dies. (*Id.*)

6. The statutes enabling certain aliens to

hold lands apply to descents from those only who are resident *aliens* at the time of their death; and therefore they confer the right of dower on the *alien* widow of an *alien* purchaser, and deny it to the *alien* widow of the *native* born and *naturalized* citizen. They authorize resident aliens to transmit lands to alien heirs, and deny it to the citizen. (*Id.*)

AMENDMENT.

1. It is not in "furtherance of justice," to allow a party, who has omitted to plead the statute of limitations in bar to a counter-claim, to serve a reply as an amended pleading, in order to avail himself of the statute. *Clinton* agt. *Eddy*, *ante*, 23.)
2. When a party omits to plead the statute of limitations, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed as having elected to stand upon the other defenses which he made to the demand on the trial, and will not be allowed to abjure such election. (*Id.*)
3. Such an amendment after judgment does not come within the terms of either §173 or §174 of the Code, and would be a stretch of the power therein conferred upon the court. (*Id.*)
4. Except in the single instance of a misjoinder of causes of action, the opportunity of *amendment of the complaint*, in the contingency of a successful demurrer to it, is left absolutely to the discretion of the court, to be exercised in conformity to the rules of the former practice and in furtherance of justice. (*Lowry* agt. *Inman*, *ante*, 286.)
5. It would not be in furtherance of justice, to allow an amendment of the complaint, with no other view than that the plaintiffs might have the privilege of looking about to see if they could not discover some means of reinforcing their case. (*Id.*)
6. In an action on a promissory note, an amendment of the complaint was allowed by inserting therein a count for goods sold and delivered, which formed the consideration of the note: *Held*, that as the amendment was in furtherance of justice, and did not change, substantially, the claim of the plaintiff, which was an existing indebtedness for property sold and delivered, and it only operated to conform the pleading to a state of facts which the evidence had already disclosed might possibly exist, it was clearly authorized. E. D. SMITH, J., dissented. (*Vibbard* agt. *Broderick*, 51 *Barb.*, 616.)
7. In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail.—*Held*, that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict. (*Emerson* agt. *Blankley*, 5 *Abb. N. S.*, 350.)

ANSWER.

1. *It seems*, that section 152 of the code of procedure,—providing that sham, and *irrelevant answers* may be stricken out,—does not authorize the striking out the whole or part of an answer as *redundant*. The first clause of section 160 of the Code,—under which irrelevant or *redundant matter* in the pleading may be stricken out,—does not authorize an *entire answer* or an *entire defense* to be stricken out as irrelevant or redundant. (*Fasnacht* agt. *Stehn*, 5 *Abb. N. S.*, 338.)
2. In an action on a foreign judgment, matters of defense alleging fraud in the obtaining of that judgment, even if conceded to be frivolous, cannot be held *irrelevant*, so as to be stricken out under section 152 of the Code. (*Id.*)
3. The fact that a plaintiff moves for a judgment, instead of moving to strike out a false answer, is no objection to granting the former, as the right to judgment follows the striking out of a false answer. (*Kreitz* agt. *Frost*, 5 *Abb. N. S.*, 277.)
4. The denial of a motion to strike out an answer as frivolous does not prevent a motion to strike it out as sham. (*Id.*)

APPEAL.

1. In an action of *claim and delivery of personal property*, where judgment is rendered for the plaintiff, that he recover the possession of said property or a certain sum being the value thereof, in case a delivery cannot be had, with costs &c.: On appeal from such judgment to the court of appeals, in order *to stay the proceedings* pending the appeal, the defendant must give an *undertaking* not only under sections 334 and 335 but, also under section 336 of the Code. (*Elliott* agt. *Buckland*, *ante*, 71.)

Digest.

2. Where after verdict a motion for a new trial on exceptions is ordered to be heard at the general term, in the first instance, the case cannot be reviewed on the question that the verdict is against the *weight of evidence*. (*Hoxie* agt. *Greene*. *ante*, 97.)

3. Where a disputed question as to an *agreement* by the defendant to allow plaintiff to saw a certain quantity of wood on the farm of the defendant for about two months after the lease from the defendant to the plaintiff of said premises, was surrendered and given up, having been fairly submitted to the jury, on a trial in the county court, on appeal from a justices' court, and they having found in favor of the plaintiff, their finding is *conclusive*, on appeal to this court. Such an agreement being based upon a good consideration is valid by *parol*. (*Balja* agt. *Rawley*. *ante*, 120.)

4. An objection taken by defendant on the trial in the justices' court, that plaintiff, by his own showing, had brought *title to land in question*, which was disputed by defendant, is an intermediate objection, arising during the trial out of the evidence offered or introduced, and to bring the same before the county court, it would be necessary to show a portion, if not all of the evidence given on the part of the plaintiff to enable the county court to judge correctly as to the merits of the objection. (*Id.*)

5. The Code (§ 360) says the justice need not return any of the evidence. Of course that section does not contemplate that the county court shall hear an issue of law on parol evidence of what took place in the justice's court. Besides, the question of title in fact, did not arise in this case. (*Id.*)

6. A *notice of appeal* which fairly apprises the opposite party that the damages are excessive, is sufficiently specific under section 371 of the Code to call upon such party to make an offer. (*Myers* agt. *White*, *ante*. 393.)

7. If such party remains silent, he does so at his peril, and if the verdict on appeal is reduced ten dollars, the appellant is entitled to costs. (*Id.*)

8. When the grounds of defense may be clearly understood by the answer, and the parties go to trial and actually try the very question on which their rights depend, objections to the answer on account of a defective statement of facts will be disregarded on appeal. (*Cythe* agt. *La Fontain*, 51 *Barb.*, 186.)

9. From an order to show cause, granted *ex parte*, returnable at a future day, and granting a temporary injunction pending the motion, no appeal will lie to the general term, until a hearing has been had on the original order to show cause, or on a motion to vacate or modify such order. (*Bloodgood* agt. *Erie R. R. Co.*, 51 *Barb.*, 273.)

10. Where it does not appear that at the trial the defendant insisted upon a juror sitting, or took any exception to his exclusion, it is too late to raise an objection, or take exception, upon appeal. (*Voorhees* agt. *Dorr*, 51 *Barb.*, 580.)

11. Judgment affirmed, with ten per cent. damages, where appeal is evidently brought simply to obtain delay. (*Maher* agt. *Carman*, 38 *N. Y.*, 25.)

12. Rule twenty five of this court was not intended to impose upon the judge the duty of acting as counsel for the party who does not appear to prosecute or defend, but to save the parties acting in good faith a further opportunity of presenting a printed brief, and to save the court the loss of time incident to motions to re-open judgments. (*Id.*)

13. General exceptions to the charge of the judge are unavailable upon appeal. (*Paige* agt. *Willett*, 38 *N. Y.*, 28.)

14. A motion for an order granting a new trial, on the ground of newly discovered evidence, and the like, is addressed to the discretion of the court, and is not the subject of appeal to this court. (*Lawrence* agt. *Ely*, 38 *N. Y.*, 42.)

15. Where the questions of fact were all fairly and precisely left to the jury, and the exceptions taken are clearly untenable, the judgment should be affirmed with costs, and ten per cent. damages. (*Winfield* agt. *Potter*, 38 *N. Y.*, 67.)

16. Where pendency of a prior suit on the same cause of action is alleged as a defense, and proves unavailing, it seems, that relief cannot be obtained on appeal to this court, but must be sought by motion in the supreme court, which has full power over the judgment. (*Id.*)

17. The findings of fact by a referee are not the subject of review in this court, except where the supreme court has reversed a judgment upon questions of fact, and so stated in their order; it is, in such case, upon appeal brought within the jurisdiction of this court. (*Colwell* agt. *Lawrence*, 38 *N. Y.*, 71.)

18. Where a specific finding by a referee is desired, it should be required by a request to that effect; and, if refused

remedy should be sought in the supreme court; it cannot be found in this court, upon a general exception, that the referee has not found upon various matters claimed to be in issue. (*Id.*)

19. Under the Code, as amended in 1857, this court has jurisdiction of an action, originally commenced in a justice's court, where the action is discontinued because a plea of title to land is interposed. The decisions reported in 6 *Howard*, 320, and 7 *Howard*, 402 and 404, were made before the amendment referred to, and are now inapplicable. (*Flora* agt. *Carbean*, 38 *N. Y.*, 111.)

20. On an appeal upon exceptions to the findings of fact in the report of a referee, the supreme court are to inquire whether the finding is against the weight of evidence, and, if so, to reverse it; in this court, the question presented is only whether there is any evidence to sustain the finding. (*McCabe* agt. *Brayton*, 38 *N. Y.*, 196.)

21. Where an order reversing judgment, and directing a new trial, is made by the general term, upon questions of both fact and law, it is the duty of the court, under section 298 of the Code, upon an appeal from such order, to determine whether it was correctly made on either ground. (*Coleman* agt. *Second Avenue R. R. Co.*, 38 *N. Y.*, 201.)

22. A motion made upon the trial to amend the answer is addressed to the discretion of the court, and its exercise cannot be reversed by this court. (*Richmeyer* agt. *Remsen*, 38 *N. Y.*, 206.)

23. Where the finding of a referee, upon question of fact, is wholly without evidence, it can be reversed by this court; but, if the testimony is conflicting, and the finding has evidence to sustain it, it cannot be reviewed here. (*Porter* agt. *Buckman*, 38 *N. Y.*, 210.)

24. The present action was for several causes enumerated. Upon the trial, evidence of a former action, trial and judgment, for one of these causes, was given without objection. It is here claimed, that such evidence was inadmissible, under the answer in the present action, for the reason, that the allegation is, that the whole of the present action is the same as that previously brought, when, in fact, that action embraced only a portion of the subject matter of the present. *Held*, that the objection, not having been taken upon the trial is not available here. (*Draper* agt. *Stouvenel*, 38 *N. Y.*, 219.)

25. Whenever a question of fact is found by a judge or referee, contrary to what the undisputed evidence requires, a legal error is committed, that may be corrected upon appeal by this court. (*Id.*)

26. Where the charge of the court contains several propositions, as to some of which it is unobjectionable, an exception taken to each and every part of the charge presents no questions for review on a bill of exceptions. (*Caldwell* agt. *Murphy*, 1 *Kern.*, 416; *Jones* agt. *Osgood*, 2 *Seld.*, 223; *Newell* agt. *Dalys*, 33 *N. Y.*, 83.) (*Stone* agt. *The Western Transportation Co.*, 38 *N. Y.*, 240.)

27. An exception "to each and every part" of the report of a referee, "both as to its findings of fact and conclusions of law," is too general to authorize this court to review any question arising upon such report. (*Wheeler* agt. *Billings*, 38 *N. Y.*, 263.)

28. The general term having the power, and it being their duty, to inquire, whether the findings of the court below accorded with the weight of evidence, and, if not, to reverse them, that question cannot be entertained by this court, where there was any evidence to sustain the findings; hence, where an assignment, for benefit of creditors, is found to have been made without reference to a previous transaction, with which it is sought to show a fraudulent connection, and there is evidence to support such finding, it will not be disturbed on appeal to this court. (*Loeschick* agt. *Baldwin*, 38 *N. Y.*, 326.)

29. The conclusions of the referee upon matters of fact are binding upon this court, if there is any evidence to sustain them. If there is no competent evidence to sustain such conclusions, or if the undisputed evidence establishes the contrary, it then becomes a question of law, and this court is at liberty to examine it. (*Fellows* agt. *Northrup*, 39 *N. Y.*, 117.)

30. If a motion for a temporary injunction is denied, not on the ground that the plaintiffs could ultimately have no relief, but because a temporary interference was not deemed advisable by the court to which the application was made, the court of appeals will not review the discretion of that court upon the question. (*Hasbrook* agt. *Kingston Board of Education*, 5 *Abb.*, *N. S.*, 399.)

31. In order to sustain an appeal, the papers should show that the motion was denied upon the ground that the plain

tiffs could ultimately have no relief. (*Id.*)

32. An order removing the committee of a lunatic, and appointing another person in his stead, is a matter in the discretion of the court, and an appeal does not lie therefrom to the general term. (*Matter of Griffin*, 5 *Abb., N. S.*, 96.)

33. In a creditor's action, judgment was rendered setting aside an assignment as void, and directing the assignees to account. A referee was appointed to take the accounting, and on his report coming in, an order was entered upon his report, requiring defendants to pay to the receiver the sum certified against them on the accounting. No appeal was taken from the first judgment or order, but the defendants appealed from the second one, made upon the accounting, and the supreme court at general term, on considering the appeal, reversed both orders.—*Held*, that on the appeal to the court of appeals the latter court might review the question on the merits whether the defendants were accountable for certain items found against them by the referee, although this was done in pursuance of the order or judgment made on the trial of the issues, which had not been appealed from. (*Colburn* agt. *Morton*, 5 *Abb., N. S.*, 308.)

34. In an action of an equitable nature,—*e. g.*, by one member of a partnership to enforce against the other members, or the estate of a deceased member claims growing out of the partnership business,—a referee's finding of the facts is held conclusive, if there is any evidence to sustain it. The appellate court will not inquire into the weight of the evidence. (*Barker* agt. *White*, 5 *Abb., N. S.*, 124.)

35. In such a case the award of costs is in the discretion of the referee, and the appellate court will not control that discretion, except, perhaps, in case of its palpable abuse. (*Id.*)

36. The defendants, on appeal, cannot insist that a third person was a partner with the plaintiffs and interested in the subject matter of the litigation, where they did not raise that issue by their answer. (*Dodge* agt. *New York and Washington S. S. Co.*, *ante*, 524.)

37. It is no ground of error, for which a judgment can be reversed on appeal, that the court below, on motion, refused to allow a witness to be recalled for the purpose of giving a new piece of evidence claimed to have been discovered *since the evidence was closed*, on the trial, on the preceding day, and of the existence of which the moving party claimed to have been ignorant. (*Id.*)

38. An objection to the authority of an agent, which was not made on the trial, cannot be raised on the argument, in this court. To obtain the benefit of it here, it is necessary that it should have been made on the trial, so specifically, that the party would have known what was the defect he was called upon to supply. (*Wolfe* agt. *Security Fire Ins. Co.*, 39 *N. Y.*, 49.)

ARBITRATION.

1. An *award of arbitrators*, made without disagreement, should not be lightly disturbed—certainly not without some evidence of fraud, corruption, partiality or unfairness. (*Turnbull* agt. *Martin*, *ante*, 20.)

2. That the arbitrators received as testimony on the plaintiff's behalf some *ex parte* affidavits; and that they refused to permit the defendant to inspect those parts of plaintiff's books in respect to which testimony was being given, are not sufficient grounds (even if not denied) to disturb the award. (*Id.*)

3. To entitle a defendant to insist upon an *award* upon the cause of action as a bar, he must allege it as such in his answer. It stands upon the same footing as a former judgment on the same matter in litigation, and must be pleaded to be available. (*Lobdell* agt. *Stowell*. *ante*, 88.)

4. Under a lease in which the lessor covenants to give a renewal if the lessee should serve a notice binding himself to take and accept it, the rate of rent upon such renewal to be fixed by arbitration—the giving of such notice becomes immaterial after the parties have both proceeded to the appointment of arbitrators. (*Viany* agt. *Ferran*. 5 *Abb. N. S.*, 110.)

5. In such case, if the arbitration fails, by reason of the arbitrator chosen being unable to complete the reference, and the parties failing to agree on another umpire, the lessee may maintain an action of an equitable nature to compel the execution of a renewal lease, and have a reference to ascertain what the amount of rent should be. (*Id.*)

ARREST.

1. An *order of arrest* for fraud in the purchase of goods by representing a bank check drawn by a third person to the

order of the defendant given by him in payment therefor, to be good, and that it would be paid on presentation at the bank, cannot be sustained where it appeared that on the day of the purchase and on the subsequent day, the drawer of the check had sufficient funds in the bank for the payment of said check, but that he closed his account with the bank on the day previous to the presentation of the check at the bank in the course of regular bank exchanges, there being no evidence connecting the defendant with the closing of the bank account, and no insolvency of the drawer of the check shown. (*Stewart* agt. *Potter*, *ante*, 68.)

2. Although cotemporaneous acts of fraud of a similar character with the one charged in the action, are undoubtedly material in actions of this kind, yet they must be proved as other facts are, not by hearsay. (*Id.*)

3. Where a person is improperly arrested on an alleged criminal charge committed in Canada, and is *detained* under such arrest for the probable purpose of compelling him to settle a demand claimed to have been fraudulently made in Canada, and such purpose proving ineffectual, an order of arrest in a civil action is obtained and he is arrested under it: *Held* a clear abuse of the *process of the law*, which cannot be sanctioned by the court. Order of arrest set aside with costs. (*Benninghoff* agt. *Orwell*, *ante*, 235.)

4. The official character of an individual as sheriff in another State, and a bench warrant issued to him as such sheriff upon an indictment found in that State will not authorize him to arrest the person named therein within this State and carry him beyond its boundaries. In respect to those acts he is to be treated as a private person acting without legal process. (*Mandeville* agt. *Guernsey*. 51 *Barb.* 99.)

5. An arrest of a person within this State by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the State, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law and by statute. (*Id.*)

6. One who has arrested another without process, or on void process, wrongfully, cannot detain him on valid process, until he has first restored such party to the condition he was in at the time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment commenced without authority and by his wrongful act. (*Per* J. C. SMITH, *J.*) (*Id.*)

7. A criminal warrant should contain a command, or a requirement in the nature thereof, to the person to whom the warrant is directed, to make the arrest. A mere authority, in the nature of a license or permission to make the arrest would not be a warrant, within the statute, or at common law. (*Abbott* agt. *Booth*. 51 *Barb.* 546.)

8. But where the warrant is directed, in the body thereof, "to the sheriff or any constable of the county," in which the magistrate resides, an authority cannot be conferred on a person who is not an officer, to execute the same, by an indorsement on the back thereof, signed by the justice, "authorizing and empowering" such person to arrest the defendant and bring him before the justice. Such an indorsement is not a direction to the person named therein; and the warrant will afford no justification to him for an arrest make under it. (*Id.*)

9. A judgment by default, modified by an order allowing the defendant to answer and thus litigate plaintiff's claim, but directing the judgment to stand as security for the alleged indebtedness, is not "a final determination of the rights of the parties" as defined in section 245 of the Code, and hence, is no legal obstacle to a valid order of arrest under section 183 of the Code. (*Mott* agt. *Union Bank*, 38 *N. Y. R.* 18.)

10. An action for false imprisonment by reason of commitment to jail under an order of arrest in the above cited case not sustained. (*Id.*)

11. Where the right to an arrest flows directly from the nature of the cause of action itself,—*e. g.* in an action for the wrongful conversion of personal property,—the court will not try the merits upon affidavits, and will not discharge the order, unless defendant makes out a clear case of innocence. (*Roy. Ins. Co.* agt. *Noble*. 5 *Abb., N. S.*, 51.)

12. It is no reason for dispensing with this rule, that the calendar is so crowded that the case may not be reached for a trial on the merits for a long time; and that, meanwhile, the defendant, being unable to procure bail, is imprisoned. In such a case, the court of common pleas will advance the cause upon the

calendar, so as to give an early trial. (*Id.*)

13. Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder. (*Goodwin* agt. *Sharkey*, 5 *Abb., N. S.*, 64.)

14. The bankrupt, therefore, cannot be arrested in proceedings under the act of 1831, of this state, known as the "Stilwell Act," by a creditor seeking to reach the property of the bankrupt. (*Id.*)

ASSESSMENTS.

1. The provisions of the act of April 17, 1858, (*Laws of* 1858, *ch.* 388,) are only intended to relieve against fraud, or legal irregularity, in the proceedings relative to an assessment, or the proceedings to collect the same. (*In the matter of Lewis*, 51 *Barb.*, 82.)

2. The act does not authorize any inquiry whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances. (*Id.*)

3. These matters belonged to the common council, as the law was formerly, and now to the board of review; and do not come within the purview of this statute, except in cases where fraud is alleged to have been committed. (*Id.*)

4. It is erroneous for assessors to include in their assessment a charge for making the assessment. (*In the matter of Wood*, 51 *Barb.*, 275.)

5. Although the court does not, in a proceeding under the act of 1858. (*Laws of* 1858, *ch.* 338.) inquire whether the work was well done, or done according to the contract, so far as relates to the material or workmanship, yet when it appears that the certificate was given will a full knowledge that the work was not finished, it is a violation of the contract which prohibits the contractor from receiving payment until the whole work is completed, and is unjust to the owners who are assessed for its payment. (*Id.*)

6. If an assessment is void as to persons whose property is assessed, their right to maintain an action to restrain the city from collecting it, is clear, not only to avoid a multiplicity of suits, but also to remove a cloud from their respective titles created by the lien of the assessment. (*Irsland* agt. *City of Rochester*, 51 *Barb.*, 414.)

7. It is the duty of assessors to estimate the contingent liability of an insurance company upon outstanding policies of insurance in force, by the usual rules for determining such liability, and to deduct the assessment so found, in making their assessment of the company, for the purpose of taxation. (*The People* agt. *Ferguson*, 38 *N. Y.*, 89.)

8. An action to set aside an assessment may be brought, where, in case the property were sold to pay the assessment, the purchaser could establish title by the record. (*Hatch* agt. *City of Buffalo*, 38 *N. Y.*, 276.)

9. Hence, where the statute enacts, that the conveyance shall recite certain proceedings, which shall be evidence that the assessment is legally imposed, but such recital does not embrace the particular upon which the illegality is claimed, the record title being good, an action to set aside the assessment will die. (*Id.*)

10. It is only where the assessment is void on its face, or where the proof necessary to enable a party to claim title under it, will of itself show that the assessment is void, that such action will not lie. (*Id.*)

11 The commissioners appointed to estimate and assess damages and awards, in the matter of widening and improving streets in the city of New York, have sole jurisdiction in making the estimates of the value of property taken for such improvments, subject to appeal to the special term to the supreme court, and no other judge, jury, court or referee has the slightest authority to examine into the matter. (*Mayor, &c. of City of New York* agt. *Erben*, 38 *N. Y.*, 305.)

12. Where an assessment upon property is improperly or irregularly made, and where a certificate of sale of property, under such assessment, is made *prima facie* evidence of title, such certificate of sale becomes a cloud upon the title, and an action *quia timet* will lie to remove it. (*Allen* agt. *City of Buffalo*, 39 *N. Y.*, 386.)

ASSIGNMENT.

1. A cause of action for damages for procuring a sale of goods by false repre-

sentations, is assignable; and the assignees may sue thereon without joining the assignor. (*Johnson* agt. *Bennett*, 5 *Abb. N. S.*, 331.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. The act of April, 1860, providing for a *general assignment for the benefit of creditors*, requires a *record* of the assignment, in these words, to wit: "§ 6. Every conveyance or assignment made by any debtor or debtors under the provisions of this act, *shall be recorded in the clerk's office of the county* in which such debtor or debtors resided at the date thereof; and every inventory of the property of such debtor or debtors made under the provisions of this act, shall be filed in the same office where such assignment is recorded."

2. *Held*, that this statute did not convey *constructive notice*, to any purchaser of *real estate in the city of New York*, which had been previously conveyed by such a general assignment and recorded in the county clerk's office of the city and county of New York; and where the purchaser had not received actual notice of such recorded assignment or information thereof sufficient to put him on inquiry, he must be considered a *bona fide* purchaser without notice, and capable of conveying and executing a good title to such real estate, free from the incumbrance or conveyance caused by such assignment. (*Simon* agt. *Kaliske*, *ante*, 249.)

3. An assignment by an insolvent firm, for the benefit of creditors, in pursuance of an agreement between the debtors and certain of the creditors, that the latter shall be preferred in a second class to the extent of fifty cents on the dollar of their claims, on condition that said preferred creditors discharge the firm from all liability upon the balance of their indebtedness to such creditors, is not void as against creditors not parties to the agreement, and not preferred by the assignment. (*Spaulding* agt. *Strang*, 38 *N. Y.*, 9.)

4. An assignment is not void, by reason of withholding from the assignee any discretion to sell the trust property upon credit. (*Grant* agt. *Chapman*, 38 *N. Y.*, 293.)

5. An assignment is not void, by reason of a conditional or contingent provision of preference, where no unnecessary delay is intended. (*Id.*)

6. An assignment is not void, by reason of a provision in mere affirmance of the legal obligations of the assignee. Hence, where an item in the schedule of preferences directed the payment of the amount found due the sheriff, &c., in case certain attachment proceedings, affecting a portion of the goods assigned, should be sustained, *held*, that such provision did not render the assignment invalid. It only directed the assignee to do what he would have authority to do without such provision. (*Id.*)

7. In assignments for the benefit of creditors, it is necessary that the assignor make the acknowledgment required by the statute (*Laws* 1860, *ch.* 348), before the title will become vested in the assignees. (*Hardman* agt. *Bowen*, 39 *N Y.*, 196.)

8. Even though the assignment be in writing, and be delivered together with the possession of the assigned property, creditors of the assignor may attach the property in the hands of the assignees, prior to the making of the statutory acknowledgment. (*Id.*)

9. Either member of a partnership may secure one of its creditors by a transfer of property; and this may be done by an assignment in the nature of a mortgage, with a trust to account for and repay the surplus, if any. (*McClelland* agt. *Remsen*, 5 *Abb., N. S.*, 250)

10. The statute of 1860, (*Laws of* 1860, 594, *ch.* 348, § 1),—providing that every assignment of an estate by a debtor, in trust for creditors, shall be in writing, shall be duly acknowledged, and the certificate of acknowledgment indorsed upon such assignment, before delivery thereof to the assignee.—is not merely an affirmative declarative statute. It introduces a new law in regard to assignments and is peremptory, requiring every such assignment to be duly acknowledged and indorsed before delivery. The very language of the statute implies the negative of the right to make an assignment in any other way, asserting by implication that *no assignment shall be delivered* without acknowlment, &c. (*Hardman* agt. *Bowen*, 5 *Abb., N. S.*, 332.)

11. If a debtor, making an assignment for benefit of creditors, prefers his landlord for rent of his dwelling, the assignment is void, if this be done with intent to secure the occupation of the dwelling house for the benefit of himself and family, subsequent to the assignment, without paying rent or being liable therefor. (*Elias* agt. *Farly*, 5 *Abb., N.S.*, 39.)

12. Assignees of real property for the benefit of creditors are entitled to full indemnity against their expenditures. Even though the assignment is set aside as void, and their claim to have purchased the property for their own benefit is also declared void, they should be protected on the accounting in so far as they acted intentionally for the benefit of the trust, in good faith, and without negligence. (*Colburn* agt. *Morton*, 5 *Abb. N. S.*, 309.)

13. Payments for taking charge of and preserving the trust property, such as for harvesting and saving grain crops, and for the discharge of liens, are within this rule. (*Id.*)

14. If, upon the accounting, they insist on the claim that they purchased the property in their own right, they may be charged with the difference between the amount paid by them on the purchase of the property, and its actual value. (*Id.*)

15. The statute of 1860 (*ch.* 348) requires the schedule to be made by the assignor, as a necessary part of a valid assignment, and it is a prerequisite to vesting an absolute title to the property in the assignee. (*Juliand* agt. *Rathbone*, 39 *N. Y.*, 369.)

16. The title vested in the assignee, prior to such schedule being made, is merely inchoate, and will be good if perfected by a compliance with sections two and three of said act, within the time limited—but not otherwise. (*Id.*)

17 When the assignor, having failed to comply with the conditions required by sections two and three of the above act, makes a new assignment in *good faith*, and for a valuable consideration, such new assignment will transfer a good title to the assignee. (*Id.*)

ATTACHMENT.

1. On a motion to *vacate an attachment*, where the whole evidence, contained in the affidavits on both sides, show that the plaintiff could not have known the facts to which he swore positively in the affidavit on which the warrant of attachment was obtained, therefore there being no preponderance of evidence to sustain it, the attachment must be *discharged*. (*O'Reilly* agt. *Freel*, *ante*, 272.)

2. In this case, the court considered that there might be evidence enough before it to establish that the defendant intended to retain control of his property, as long as the indulgence of his creditors and the law might permit; that he had found or would find it difficult to meet all his engagements as they had become or might become due; that he had made promises to pay which he had broken, and perhaps that he was in a precarious situation, if pressed by his creditors. (*Id.*)

3. But there was no such evidence before the court, of hurry, secrecy and sacrifice in the disposition of his property as to warrant the deduction that he intended to withdraw from the grasp of the law his property, when his creditors are in a position to seize it. Until then he is the owner and entitled to dispose of it as he thinks proper, provided he does not violate any positive law. (*Id.*)

4. Under the Code of Procedure, the only requisites for the issuing of an attachment are that the action should be for the recovery of money; that the same should be on contract; that the plaintiff should specify the amount of the claim, and the grounds of the demand; and that the defendants should be non-resident debtors. (*Lawton* agt. *Kiel*, 51 *Barb.*, 30.)

5. An allegation, in the affidavit, that the defendants have property in this state, is not necessary to the issuing of an attachment. (*Id.*)

6. It is not necessary that the affidavit should show the issuing of the summons. It is sufficient if the summons is issued, when the attachment is obtained, and if both are delivered to the sheriff together. (*Id.*)

7. The objection that an affidavit was sworn to before a commissioner in another state, but that no certificate of the secretary of state has been obtained as required by the statute of that state, is not fatal. The omission may be amended and supplied. (*Id.*)

8. After an attachment, under which goods have been seized, has been set aside as irregular, it affords no shield or protection to the plaintiffs, for such taking. The moment it is set aside, they stand as though no process had ever been issued, and become trespassers *ab initio*. (*Lyon* agt. *Yates*, 52 *Barb.* 237.)

9. Having taken the property as trespassers, they cannot, in an action against them for the tort, show that they subsequently caused it to be levied upon, by virtue of a valid execution in their favor. (*Id.*)

10. An attachment issued as a provisional

remedy, under the Code of Procedure, cannot be dissolved as to a part of the property merely, upon giving security as to such part, under sections 240 and 241 of the Code. An application for a discharge, upon the undertakings specified in those sections, must relate to the whole of the property levied on. (*Roy. Ins. Co.* agt. *Noble.* 5 *Abb. N. S.* 54.)

ATTORNEY.

1. Without a statement of the case, what seems to be determined is, that an attorney conducting various suits for a client, by commencing an action for the recovery of compensation for his services while the causes are still pending, and under his direction, which suit we may suppose to be for some cause discontinued, does not thereby bar his subsequent right of recovery for those services. (*Porter* agt. *Buckman.* 38 *N. Y.* 210.)

2. Where an attorney and counsel agreed with his client to conduct an appeal from the surrogate to the supreme court and argue it there, and the client agreed thus: "If he succeeds, and the decision of the surrogate is reversed by the supreme court, I am to pay him $1,000," in addition to disbursements, &c.; "and it is understood that in case it should be necessary to contest the case in the court of appeals, said Hitchings is to have such further compensation, for such further services, as may be agreed upon," "and it is also further agreed that I will not settle the case with the other parties without his approval, and, in case of doing so, am to be immediately liable for his full compensation as herein provided;" and such appeal was argued, but the decree of the surrogate was affirmed, and afterwards, by authority of the client, an appeal was taken to the court of appeals, pending which appeal the client settled the case without the knowledge or consent of his counsel:

3. *Held:* that the client is not liable for the $1,000. On failure to reverse the decree of the surrogate in the supreme court, all claim to the $1,000 was at an end, and the restriction of the right of the client to settle no longer operated. (*Hitchings* agt. *Van Brunt.* 38 *N. Y.*, 335.)

4. The appeal having been taken to the court of appeals by the client's consent, the latter was liable for the services rendered therein. (*Id.*)

BANKING CORPORATIONS.

1. Where an *act of the legislature of another state incorporating a bank* therein, provides that without any action against a stockholder thereof, his private property shall be bound by a judgment against the bank, and subject to execution upon such judgment, it imposes no *personal liability* whatever upon the stockholder which can be made the ground of an action against him here or elsewhere. (*Lowry* agt. *Inman, ante,* 153.)

2. Such a provision in the charter is a mere regulation of the *remedy* and has no force or effect beyond the limits of that state, and the remedy being exclusive, the stockholder cannot be pursued in this state in a form and by an action different from that provided in the charter, even though it imposed a personal liability upon him. (*Id.*)

3. A *bank* receiving from another bank, notes, bills, &c., for collection, obtains no better *title* to them or their proceeds, than the remitting bank had, unless it becomes a *purchaser for value, without notice of any defect of title.* (*Commercial Bank of Clyde* agt. *Marine Bank, ante,* 432.)

4. The receiving bank is not a purchaser for value, by reason merely of its having a balance against the remitting bank for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing upon the *proceeds* for balances at pleasure. (*Id.*)

5. The distinction in reference to a change of title to such paper is this: If the receiving bank is at liberty, in pursuance of the general arrangement between it and the remitting bank, *to credit the paper on receiving it,* and does so, to form a fund upon which the remitting bank is entitled to *draw immediately,* then the ownership of the paper and its proceeds as between the banks, is in the *receiving bank*; but where the paper is transmitted to the receiving bank *for collection merely,* and is to be credited to the remitting bank *when received* by the receiving bank, then the title does not pass to the receiving bank. (*Id.*)

6. In an action by a stockholder against a corporation, to recover a dividend declared by resolution of the directors, in general terms, of so much money per share, evidence that the earnings of the

corporation were received in property other than money, is incompetent, as it alters the legal effect of the resolution, which is no more admissible than it would be to alter its terms. (*Scott* agt. *Central R. R. and Banking Co. of Georgia*, 52 *Barb* 45.)

7. Where a corporation makes dividends, payable in dollars, without any limitation, and without directing the payment to be made in any currency whatever, the case of *Ehle* v. *The Chittenango Bank*, (34 *N. Y. Rep.* 548,) prevents an inquiry into the means out of which it determined to make the dividends. The corporation is concluded by the resolutions directing the dividends. *Per* INGRAHAM, J. (*Id.*)

8. Where one who has agreed to take stock, but has not paid for it, transfers the same in good faith, and without fraud, to a person supposed at the time to be a man of wealth and responsibility, and no debts of the bank existing at the time of such transfer are outstanding at the time a receiver of the bank is appointed, such receiver is bound by the acts of the bank in recognizing the transferree as the owner of the stock and the debtor thereon; and can not maintain an action against the transferrer, to recover the amount of his subscription for the stock. (*Cole* agt. *Ryan*, 52 *Barb* 169.)

9. The cashier of a bank, as one of its financial officers, in its daily and ordinary business transactions, has authority to certify checks drawn on the bank, by its customers, in all cases where any officer could do the same and bind the bank. (*Clarke National Bank* agt. *Bank of Albion*, 52 *Barb* 592.)

10. A cashier has no power, however, to to make the certification, unless he has the funds of the drawer in hand to meet the check. This limitation on his general authority is, in the law, presumed to be known by all the bank's customers and others who act upon the statements and representations of its agent. (*Id.*)

11. Neither has a cashier power, as the agent of the bank, to certify a check until on or after the day the same is made payable. (*Id.*)

12. Where a *post-dated* check is certified by the cashier of the bank on which it is drawn, to be "good," by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification, was not acting within the known limits of his power, and that he was clearly exceeding them. (*Id.*)

13. It appearing, on the face of such paper, that it was certified by the cashier before its payment could have been legally demanded, and before it could be presumed that the drawer had made a deposit for its payment, this is, in the law, full notice to a purchaser. (*Id.*)

BANKRUPTCY.

1. Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder. (*Goodwin* agt. *Sharkey*, 5 *Abb. N. S.* 64.)

2. The bankrupt, therefore, cannot be arrested in proceedings under the act of 1831, of this State known as the "Stilwell act" by a creditor seeking to reach the property of the bankrupt. (*Id.*)

3. It seems, that the lien acquired by the commencement of a creditor's suit to reach equitable interests and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained. (*Stewart* agt *Isidor*, 5 *Abb. N. S.* 68.)

4. If it be otherwise, a creditor claiming such a lien under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien. (*Id.*)

5. Where the defendants in such an action asked leave to serve a supplemental answer, setting up their discharge in bankruptcy, and it did not appear whether the plaintiffs had disclosed their claim of lien on proving their debt in bankruptcy,—*Held*, that leave to interpose the supplemental answer must be granted. (*Id.*)

BAR.

1. Where an action *between partners* for an accounting and settlement of partnership affairs was commenced by the defendant against the plaintiff by the service of a complaint; another action subsequently commenced by the plaintiff against the defendant for the same

cause, cannot be sustained, although the complaint in the latter contains special averments and asks extended relief, but without changing the character of the action. (*Ward* agt. *Gore*, *ante*, 119.)

2. The fact that a party has sued for a part of a promissory note and recovered, supposing at the time, that the remainder had been paid, does not prevent him afterwards, on discovering that the remainder has not been paid, from maintaining an action to recover it—the former suit is not a bar to the latter. (*Conklin* agt. *Field*, *ante*, 455.)

3. In his complaint the plaintiff need only allege a balance due on the note; he is not required to set forth the mistake which caused him in the former suit to claim only a part, instead of the whole amount of the note. (*Id.*)

4. When a case is tried, and a claim is submitted to the jury or the court, it cannot in another action be litigated. Though the pleadings may present the claim, yet if no testimony is given in support of it, and it is not submitted to the court or jury, it will not be barred, unless it is a claim which the party is bound to present and litigate in that suit, as, in some cases, a set-off, in a justice's court. (*Burwell* agt. *Knight*, 51 *Barb.*, 267.)

5. If the record shows that the claim was not tried and submitted, no other proof is necessary. (*Id.*)

6. A former decision, in an action between the same parties, upon the merits, so long as it remains unreversed, and not in any manner vacated or annulled, is not only binding, but is positively conclusive, upon the parties, in a subsequent action between them for the same cause. (*The People* agt. *Smith*, 51 *Barb.*, 360.)

7. Neither of them can be at liberty either to allege or prove that the facts put in issue in the previous action, and upon the trial of it adjudged and determined against the plaintiff, were not true. And without such allegation and proof the plaintiff cannot recover in the second action. (*Id.*)

8. Where the claim of a plaintiff cannot be divided, and separate actions be maintained therefor, a recovery in an action, for any portion of the damages, bars the entire claim. (*Farrington* agt. *Payne*, 15 *Johns.*, 432, *and cases there cited*. (*Draper* agt. *Stowvenel*, 38 *N. Y.*, 219.)

9. The discharge of a debtor under an act of bankruptcy is not a bar to an action, in any stage, unless it is pleaded; and where the discharge is obtained too late to be pleaded, either originally, or by amendment, the remedy it seems, is by motion for a perpetual stay of execution. (*Palmer* agt. *Hutchins*, 1 *Cow.*, 42; *Baker* agt. *Taylor*, *id.*, 165.) (*Cornell* agt. *Dakin*, 38 *N. Y. R.*, 253.)

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. No one can become a *bona fide* holder of a promissory note, so as to shut out a valid defense by the maker, when such holder takes it after, by its terms, money is past due upon it. (*Newell* agt. *Gregg*, 51 *Barb.*, 263.)

2. Where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest *annually* is as much a part of the agreement as the promise to pay the principal. It is a portion of the debt, and if, when the note is sold to a third person, by the payee, a year's interest is past due, the note is then dishonored. (*Id.*)

3. When the instrument furnishes evidence that the written promise to pay has been broken, a party taking the same takes it with a warning that the maker may have some defense. (*Id.*)

4. Where the holder of a promissory note which is invalid in his hands, by reason of its having been already paid wrongfully, transfers it before maturity, to a *bona fide* holder, who enforces payment thereof, an action will lie against such orignal holder, by the maker, to recover back the amount. (*Id.*)

5. It is well settled that presentment of a check or draft on a bank, the day after it is drawn, is in season. Checks and drafts are subject to the same rule, in this respect. (*Kelly* agt. *Second National Bank of Erie*, 52 *Barb.*, 328.)

6. Where, on presentment of a check or draft, the holder receives from the drawee a check for the amount, such check is not a payment, if not paid; and hence the draft does not cease to be a valid obligation. The subsequent return of the check and receipt of the draft and protest of the latter, in due season, will preserve its vitality, and the holder may recover the amount from the drawers. (*Id.*)

7. The defendants were indorsers on a note given by one Nichols to plaintiffs, which had been protested for non-payment. Subsequently, Nichols inclosed to plaintiffs his check, dated ahead, with a letter requesting them to hold same,

and, when paid, he would call for the note. The plaintiffs, without communicating with Nichols, kept the check, which was not paid at maturity. In an action against the defendants as indorsers, their defense was a discharge from liability by reason of an extension of time given to the maker of the note:

8. *Held*, that the letter, by fair construction, contained a request to give time for payment of the note until the maturity of the check, and that, by retaining the check until it matured, and then presenting it for payment, the plaintiffs assented to the request. (*Place* agt. *McIlvain*, 38 *N. Y.*, 96.)

9. Extending the time of payment to the principal debtor, or, what is equivalent, suspending the right of action by the creditor, discharges the surety. (*Id.*)

10. The maker or makers of a note are discharged from liability thereon, by reason of the holder's making an agreement with some other person to extend the time of payment, in consideration of the indorsement of the note by such other person. GROVER, J. (*Kennedy* agt. *Goss*, 38 *N. Y.*, 330.)

11. Hence, it follows, that the guarantor of the maker, or of his surety, is not discharged from his liability by reason of such extension, though made without his knowledge or consent. (*Id.*)

12. Where the indorser of a promissory note, made and payable in the city of New York, at the time he indorses the note adds to his name a designation of his residence, viz: "214 E. 18th street," where he continues to reside, notice of protest of the note, if not delivered to him personally, must, in order to charge him, be sent to the place so designated, or if the notice be deposited in the post-office, it must be addressed to him at that place. (*Bartlett* agt. *Robinson*, 39 *N. Y.*, 187.)

13. An indorser has the right to designate, when he indorses, a place to which notice of protest shall be sent, and if not properly forwarded to such place, and he does not in any manner receive notice of protest, he will not be charged as indorser. (*Id.*)

14. The statute of 1857, which, when an indorser resides in the city or town in which the note is payable, authorizes the serving of a notice by depositing it in the post-office of the city or town, "directed to him at such city or town," was not intended to, and does not, abridge the right of such indorser to designate the place, within such town or city, to which notice of protest shall be sent, and when service is, pursuant to the statute, served by depositing in the post-office, such designation must be observed in directing such notice to him. (*Id.*)

15. Under the statute, a promise to accept a draft to be drawn by a party is equivalent to an acceptance. (*Johnson* agt. *Clark*, 39 *N. Y.*, 216.)

16. Where a party takes negotiable paper before its maturity, in payment of a debt *past due*, it constitutes him a holder for value. (*Day* agt. *Saunders*, *ante*, 534.)

17. Consequently, where the plaintiff held four notes of the maker—two of which were not due and two past due, on receiving an indorsed note of the same maker in payment for the full amount of the four notes, *held*, that the evidence as to the indorsed note being received in payment of the two notes past due, being precisely the same that it was in regard to the notes not due, the plaintiff was entitled to recover the full amount of the indorsed note—the note in suit—being the amount of the four notes. (*Id.*)

BILLS OF LADING.

1. Where there is no person or corporation named in a bill of lading, as contracting for the carriage of the goods, it is competent, in an action by the owner of the goods, to recover damages for their non-delivery, to show who was the owner of the vessel named in the bill of lading, by which the goods were to be carried. (*Goddard* agt. *Mallory*, 52 *Barb.*, 87.)

2. Where the agents of a vessel are in the practice of having clerks on the wharf, who sign bills of lading there, the agents are bound by this act of a clerk in signing a bill of lading there, before the goods are delivered on board; and the owner of a vessel is bound by any act which binds such agents within the scope of their agency. (*Id.*)

3. Where the practice is to issue bills of lading when goods are delivered on the dock, the owner of a vessel cannot, after this has been done, insist that a bill can only be issued after the goods are on board the vessel. (*Id.*)

4. Where goods were shipped at New York on the defendants' boat, for Montreal, under a bill of lading in the usual form, to be delivered in good condition, "the dangers of the seas and fire only excepted;" *Held*, that the defendants,

as carriers were not responsible for any loss or injury to the goods occasioned by the "act of God," there being a general exemption by law from liability against such a peril; and that the exemption stipulated in the contract embraced those accidents incident to navigation, other than those denominated the act of God—all such are denominated perils of the sea. (*Redpath* agt. *Vaughan*, 52 *Barb.*, 489.)

5. Accordingly *held*, that an injury to the goods, caused by the boat in which they were being towed upon the Hudson river, striking a hidden obstruction in the channel, not before existing there, except for a very brief period, and which had been recently carried there by the action of the waters, was occasioned by a peril of the sea, from which the defendants were expressly exempted by the terms of the bill of lading; they having by that contract restricted their liability, principally, if not wholly, to acts of fault or negligence on their part. (*Id.*)

6. If the buyer obtains a bill of lading from the seller, without any intention on the part of the seller to deliver it, and insists on retaining possession, against the remonstrance of the seller, he cannot avail himself of it to make out his title. (*Brand* agt. *Focht*, 5 *Abb. N. S.*, 225.)

BREACH OF MARRIAGE PROMISE.

1. In an action for breach of promise of marriage, declarations of the defendant that he would make a good home for the plaintiff, made at the time, and as a part of his conversations with the plaintiff which are relied on as establishing the promise of marriage, are admissible, in connection with the other conversation, as tending to prove the contract. (*Button* agt. *McCauley*, 5 *Abb., N. S.*, 29.)

2. Under a general denial, in such an action, evidence that the plaintiff drank intoxicating liquors to excess, and sometimes got intoxicated, although not competent as a defense to the action, is competent and admissible in mitigation of damages. Any misconduct showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation. (*Id.*)

BROKER.

1. An agent employed to sell goods on commission is a mere broker. As such he is authorized to make contracts for the sale and delivery of the goods, but is not authorized to make such contracts in his own name; nor to receive payment for the property so sold. (*Dunn* agt. *Wright*, 51 *Barb.*, 244.)

2. Where goods thus sold by a broker are not entrusted to the possession of the latter, but are sent by the seller to the purchaser directly, with a bill or invoice thereof, and the purchaser receives the goods, with notice that the broker does not own them, and has no right to receive payment for them, he cannot set off a debt due to him from the broker, against the claim of the seller for the price. (*Id.*)

3. An agent cannot make a profit to himself out of the business of the agency, over and above such reasonable compensation as by law or the agreement of the parties, he may be entitled to. All profits made by the agent belong to the principal. (*Minnesota Cent. R. R. Co.* agt. *Morgan*, 52 *Barb.*, 217.

4. And it being the settled doctrine of the courts, both of law and equity, that an agent cannot appropriate to his own use any portion of the profits arising from the business of the agency, a custom which overrides that rule of law, and authorizes the agent not to appropriate to himself a part only, but the whole of the profits arising from the business of his principal cannot prevail. (*Id.*)

5. The rights of all parties are best secured by requiring the broker to charge such commissions as he may be fairly entitled to, and permitting the customer to take whatever profits may be earned in the course of the business. *Per* MULLIN, J. (*Id.*)

6. A real estate broker is entitled to his usual commission for a successful negotiation of the *exchange* of property put in his hands for *sale*. He is not bound to effect a sale upon the terms named by the owner when he leaves the property with him, in order to be entitled to his commission. The terms of sale or exchange being accepted by the owner, and secured through the aid of the broker, the obligation to pay commissions becomes fixed. (*Redfield* agt. *Tegy*, 38 *N. Y.* 212.)

CERTIORARI.

1. The office of a writ of certiorari, when issued out of the supreme court to review the proceedings and determination of inferior tribunals, extends to the review of all questions of jurisdiction,

power and authority of the inferior tribunal to do the act complained of; and to all questions of regularity in the proceedings, that is, to all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the expressed terms of the statute, or by well settled principles of the common law. (*The People* agt. *Board of Assessors, &c.*, 39 *N. Y.*, 81.)

2. The judgment of the supreme court upon these questions of jurisdiction, &c., is reviewable in this court. (*Id.*)

3. The certiorari authorized by statute, to to bring up for review the summary proceedings instituted before a justice of the peace, to remove from the premises a tenant, holding over his term, requires the court to review any question of law arising either in the proceedings or upon the trial; also all questions of law arising upon the rulings of the court as to the challenge of jurors, or the admissibility of evidence or charge to the jury. (*The People* agt. *Hamilton*, 39 *N. Y.* 107.)

4. Such proceeding to remove a tenant holding over his term is not a civil action within the meaning of the Code. (*Id.*)

5. On a common law certiorari, the court may go beyond the inquiry, whether the inferior tribunal had jurisdiction of the person and subject matter, and whether its proceedings and judgment were within that jurisdiction; and may examine the case upon the whole evidence, to ascertain whether any error had been committed in the proceedings before such inferior tribunal. (*The People* agt. *The Board of Police*. 39 *N. Y.* 506.)

6. Neither upon principles of the common law, nor under the Code, are costs awardable on a common law certiorari, and it is error in an inferior tribunal to award costs in such cases, (*Id.*)

CHATTEL MORTGAGE.

1. Where, in an action arising upon a chattel mortgage (the parties to which are residents of Pennsylvania, and on a vessel registered in a port of that state), testimony is given, that, by the law of Pennsylvania, chattel mortgages, unaccompanied by a change of possession—as was shown in this case—are, and always have been, fraudulent and void, and this testimony stands wholly uncontradicted, it is error for the court to charge, that the plaintiff's mortgage was a valid mortgage. (*Watson* agt. *Campbell*, 38 *N Y.*, 153.)

2. A chattel mortgage upon the merchandise and stock in trade of the mortgagor, expressed to include "the increase and decrease thereof," is wholly void. (*Mittnacht* agt. *Kelly*, 5 *Abb. N. S.* 442.)

3. Property embraced in the mortgage, although not a part of the stock in trade which was the subject of the increase and decrease spoken of, is not protected by the mortgage, and may be levied on under a judgment against the mortgagor. (*Id.*)

CITY OF ROCHESTER.

1. By an amendment of section 164 of the charter of the city of Rochester, adopted in 1865, it is provided that no contract shall be let for making any public improvement, at a price greater than the estimate thereof. *Held*, that the amendment means, simply, that in contracting for making a public improvement, the work *included in the estimate* shall not be let at a higher price than that specified in the estimate. That it does not prohibit the common council from causing other work to be done, in addition to that included in the estimate, if they find it necessary, in order to complete the improvement. (*Ireland* agt. *City of Rochester*, 51 *Barb.*, 414.)

2. The common council having authority to make an expenditure, for an improvement in excess of the estimate, in their discretion, and to levy an assessment to meet it, and having passed a resolution for that purpose, which recites the fact that an expenditure has been made, in such improvement, of a specified sum in excess of the estimate, the resolution itself, if valid, is at least *prima facie* evidence of such expenditure. (*Id.*)

3. The want of notice is not cured by the provisions of sections 207 and 208 of the city charter declaring the proceedings valid notwithstanding any "irregularity, omission or error." These provisions do not extend to jurisdictional defects. (*Id.*)

4. The common council cannot direct an assessment for a deficiency, without notice to those on whom such an assessment will fall, even though they are occupants of the original territory, and as such had notice of the original proceeding. (*Id.*)

5. The whole policy of the charter of the city of Rochester so far as it can be

gathered from the language employed, is opposed to the idea that the owners of lands may be assessed for local improvements without notice; whether the assessment is for the purpose of raising the original estimate or meeting a deficiency; and whether the lands are within the original or the enlarged territory. *Per.* J. C. SMITH, *J.* (*Id.*)

6. The charter of the city of Rochester, which creates three justices of the peace in said city, to be elected by the legal voters of the city, and provides that in exercising civil jurisdiction, they shall be deemed justices of the peace of the county of Monroe, and that the general laws relating to proceedings before justices of the peace of the several towns in the state, shall be applicable to proceedings before them, does not violate the provisions of section 17 of the 6th article of the constitution of this state, respecting the mode of electing justices of the peace. (*Dawson* agt. *Horan*, 51 *Barb.*, 459.)

7. Those provisions relate only to justices of the peace of towns; and the 14th section expressly empowers the legislature to establish, in cities, inferior local courts of civil and criminal jurisdiction, and the enactment of the charter is a valid exercise of such power. (*Id.*)

8. The provision of the charter which makes applicable to proceedings before the city justices, all the general laws of the state relating to proceedings before the justices of the several towns, is sufficiently comprehensive to embrace subsequent as well as prior enactments. (*Id.*)

9. The law extending the jurisdiction of justices, in actions on contract, to $200, (*Laws of* 1861, *ch.* 158,) having been passed on the same day as the charter of the city, it is to be presumed that, in enacting it, the legislature had in view the provision of the charter above referred to. The effect of the two enactments, read together, (as they should be,) is to extend the jurisdiction of the justices of the peace of the city of Rochester. (*Id.*)

10. The establishing and running a horse railroad in the public streets of the city of Rochester held to be an imposition of an additional burden upon the land of an adjoining proprietor covered by such street. (*Craig* agt. *Rochester City and Brighton R. R. Co.*, 39 *N. Y.*, 404.)

11. And that such proprietor could maintain a suit to enjoin, perpetually, the railroad company from laying down such tract in the street, and from running their cars over the same. Judges WOODRUFF, MASON and DWIGHT, dissenting. (*Id.*)

CLAIM AND DELIVERY.

1. Where the plaintiff in an action for the claim and delivery of personal property, dies after the execution of an undertaking to him by the defendant for the purpose of regaining possession of the property, and before the trial, and another person is substituted in his place, as plaintiff, the person so substituted is the party entitled to recover, and as such, the undertaking takes effect in his favor as the plaintiff entitled to a return of the property. (*Emerson* agt. *Booth*, 51 *Barb.*, 40.)

2. In an action upon an undertaking given by the defendants, in an action for the claim and delivery of personal property, judgment may be rendered for the penalty of the undertaking and interest thereon from the date of the judgment. (*Id.*)

3. Where a plaintiff in replevin took several chattels from the possession of the defendant, and recovered final judgment for a part of them only, on a trial on which the title to the whole was contested, he cannot, on the trial of a subsequent replevin brought to regain the possession of the residue of the chattels by him, from whose possession they had been so taken, be permitted to allege title and prove it by the "same evidence by which he had endeavored to prove title to the same property" on the former title, and failed. (*Angel* agt *Hollister*, 38 *N. Y.*, 378).

4. The effect of a verdict in replevin against the plaintiff, where the defendant, by his answer, merely puts in issue the allegations of the complaint, is not necessarily conclusive that the plaintiff has no title to the property; it may have been found that the defendant did not wrongfully detain. Its effect therefore, depends upon extrinsic evidence. (*Id.*)

5. But, where the property was taken from the defendant's possession, and it is proved that the title to the property was in fact the subject of the contest on that former trial, the verdict therein for the defendant is conclusive. (*Case of Yates* agt. *Fassett*, 5 *Denio*, 21, *compared and applied.*) (*Id.*)

6. Where property has been replevied, and the defendants have put themselves upon their claim of right, and have actually procurred a restoration of the property to their possession, no subse-

quent offer to return the property, unaccompanied with an offer to submit to a judgment in favor of plaintiffs for the possession of the same, can be of any avail. (*Brewster* agt. *Silliman*, 38 *N. Y.*, 423.)

7. Damages whether arising out of the loss of the use, or depreciation, are compensated by the damages recovered *for the detention of the property*. Per WOODRUFF. *J.* (*Id.*)

COLLECTORS BOND.

1. The collector of taxes, upon the receipt of his warrant as collector, becomes debtor to the county in the sum which he is authorized to collect, which indebtedness can be discharged in one of two modes only: 1. By producing to the treasurer of the county a duplicate receipt of the officer to whom the collector is directed to pay the moneys collected: or, 2. By making his affidavit, that certain taxes remain unpaid, and that, upon diligent inquiry, he has been unable to discover any property belonging to the person charged with such taxes, whereof he could levy the same. (*Fake* agt. *Whipple*, 38 *N. Y.*, 394.)

2. In an action against the sureties of such collector, upon his official bond, it is no defense to show, that the warrant was not delivered to the collector in season to enable him to give the requisite notice, before he could enforce the collection of taxes upon such warrant, without going further, and showing, that the collector had not actually received the money for such taxes. (*Id.*)

3. Where the county treasurer has issued his warrant to the sheriff of the county, for the collection of the amount of the collector's defalcation, which warrant has been duly returned indorsed, "unsatisfied for want of goods, &c., whereon to levy," in an action on his official bond, these facts being made to appear, and no other facts being established, the defendants, as such sureties, are liable for the amount thus sought to be collected. (*Id.*)

COMMISSION MERCHANT.

1. Where a *commission merchant* has, under his instructions, a *reasonable time* thereafter, within which to negotiate and effect a sale of the goods consigned, at the best possible market price, the measure of damages, to be recovered against him is the *market value of the goods during that period of time*. And such value the plaintiff is bound to establish affirmatively, by competent evidence as a part of his case. (*Graham* agt. *Maitland*, *ante*, 307.)

2. No case can be found, where proof of a *single sale*, has been held sufficient evidence to establish the market value of the article so sold. (*Id.*)

COMMON CARRIERS.

1. The owners of a steamboat employed in the business of towing boats, for hire, are not common carriers, and hence not insurers. But they are liable if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the boats towed. (*Wooden* agt. *Austin*, 51 *Barb.*, 9.)

2. A provision in a contract for towing that the boats shall be towed "at the risk of the master and owner" of such boat, refers to the perils of navigation, simply, and cannot properly be construed to excuse the negligence of the proprietors of the towing vessel, or those in charge thereof. (*Id.*)

3. Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute. (*Id.*)

4. A receipt, such as is usually given by express companies for goods delivered to them for transportation, is not subject to any stamp duty, but is covered by the exception in the act of congress of 1865. (*Belger* agt. *Dinsmore*, 51 *Barb.*, 69.)

5. An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property entrusted to it, is the same as that of a carrier. It cannot by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability in whole or in part, if goods are lost through its negligence. (*Id.*)

6. The defendants shipped a part of the cargo to New York by rail, and directed plaintiff to take the remainder to New York in the spring, which he did, where he was detained by defendants fifteen days in unloading, the usual time being but three. The defendants paid freight, but refused to pay dam-

ages. (*Starbird* agt. *Barrons*, 38 *N. Y.*, 230.)

7. This action was brought to recover damages, for the failure of defendants to furnish a full cargo; for the delay in loading; for the consequent failure of the plaintiff to get through to New York that season; for injury to the boat at Schenectady, and for unnecessary delay in unloading at New York. (*Id.*)

8. On the trial, the court excluded nearly all the evidence offered by plaintiff to show his damages, and the jury found a verdict for defendants. (*Id.*)

9. The judgment is here reversed specifically upon the ground of error in excluding this evdence But other important principles underlie this question of evidence, and are discussed in the opinion, and seem to have the sanction of the court. (*Id.*)

10. To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. (*Grosvenor* agt. *The N. Y. C. R. R. Co.*, 39 *N. Y.*, 34.)

11. To complete the delivery of goods to the carrier, it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. (*Id.*)

12. The insurance of goods by the owner thereof, while in course of transportation, and the receipt of the amount of the insurance upon the happening of a loss, do not entitle the carrier to recover his freight from the owner, as money received to his use, notwithstanding the amount of the insurance payable was determined by the market value of the goods at the place of delivery. (*McKibbin* agt. *Peck*, 39 *N. Y.*, 262.)

13. But where goods were shipped at Buffalo for New York, and the boat containing the goods was sunk in the the river at Albany, and the owner thereupon gave up to the insurance company the *spes recuperandi*, and received the sum insured as for a total loss, upon which the goods were taken possession of by the agents of the company in their damaged condition and disposed of, the carrier being ready and willing to continue the transportation to New York, the place of delivery,—*held*, that these facts are equivalent to an acceptance of the goods by the owner at the place of the accident, and entitle the carrier to recover from such owner his freight *pro rata itineris*. (*Id.*)

14. Where merchandise is delivered to one of several connecting railroad companies, under a contract with such company, for its transportation to a point upon the road of another such company, the owner cannot maintain an action against the latter company founded upon the common law liability of carriers. (*Manhattan Oil Co.*, agt. *Camden, &c., Railroad*, 5 *Abb. N. S.*, 289.)

15. In order to maintain an action against a common carrier for injuries to goods entrusted to him for transportation, it must be established that the property was *actually delivered* to him, by being placed in such a position that it might be taken care of by the carrier or his agent having charge of the business, and under his immediate control. To show that such agent was notified, does not make out a valid acceptance and delivery. The place of delivery is important, and due care must be used to leave the property where it is not exposed to danger. (*Grosvenor* agt. *N. Y. C. R. R. Co.*, 5 *Abb. N. S.*, 345.)

16. Where the consignee is absent from the terminus of the carriers route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier, by depositing the merchandise in a warehouse, although it is otherwise of an intermediate carrier, whose duty it is to deliver to the next carrier on a road beyond. (*Northrup* agt. *Syracuse, &c., R. R. Co.*, 5 *Abb. N. S.*, 425.)

COMPLAINT.

1. Except in the single instance of a misjoinder of causes of action, the opportunity of *amendment of the complaint*, in the contingency of a successful demurrer to it, is left absolutely to the discretion of the court, to be exercised in conformity to the rules of the former practice and in furtherance of justice. (*Lowry* agt. *Inman*, *ante*, 286.)

2. It would not be in furtherance of justice, to allow an amendment of the complaint, with no other view than that the plaintiffs might have the privilege of looking about to see if they could not discover some means of reinforcing their case. (*Id.*)

3. Distinct causes of action, which may be united in the same complaint, should be separately stated, as declared by

section 167 of the Code of Procedure. But, in such case, if the causes of action are not separately stated, the remedy is by motion, and not by demurrer. (*Bass* agt. *Comstock*, 38 *N. Y.*, 21.)

4. An omission to state, by distinct counts distinct causes of action, which may be joined in the same complaint, is not a misjoinder of causes of action under section 172 of the Code. (*Id.*)

5. When plaintiff's complaint may reasonably import the averment of a good cause of action, it is not to be held bad on demurrer because its language is susceptible of a construction excluding any such cause. The court will adopt a rational construction rather than one which makes the complaint an absurdity. (*Olcott* agt. *Carroll*, 39 *N. Y.*, 436.)

6. The remedy for superfluous matter in a complaint,—such as an allegation of abandonment, in an action for divorce on the ground of adultery,—is by motion, not by demurrer, although such matter be stated in a form appropriate to a separate cause of action. (*Ward* agt. *Ward*, 5 *Abb., N. S.*, 145.)

CONSTITUTIONAL LAW.

1. The act of the legislature of this state entitled "An act to authorize the town of Saratoga, in the county of Saratoga, to issue bonds to aid in the construction of a railroad from the village of Mechanicsville to intersect the Glens Falls Railroad," passed April 27, 1868, (*Laws of* 1868, *ch.* 334,) is unconstitutional and void. (*Sweet* agt. *Hulbert*, 51 *Barb.*, 312.)

2. An amendment of the charter of the city of New York is a local act within the meaning of section sixteen, article three, of the constitution of the state of New York. (*The People* agt. *O'Brien*, 38 *N. Y.*, 193.)

3. Where, in an act entitled, "An act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof, and to provide for the auditing and payment of unsettled claims against said city, and in relation to actions at law against the corporation," a provision is inserted, amending the charter of the corporation in relation to the term of office, and the time of electing councilmen of said corporation, the same is in conflict with section sixteen of article three of the constitution of the State of New York. (*Id.*)

4. An act of the legislature, taking land in this state for a public use, is not unconstitutional, because the instrumentality employed for that purpose is a corporation created by the laws of another state. (*In the matter of Peter Townsend*, 39 *N. Y.*, 171.)

5. Nor because such corporation derives a pecuniary benefit from the use of the lands so appropriated: (*Id.*)

6. Nor because the lands appropriated are to be used for the maintenance of a navigable canal, which runs along the border of the state, but without its limits. (*Id.*)

7. If the use be in its nature public, the legislature are the sole judges of the question, whether the benefit to our citizens or to the state is such as to warrant the taking of private property therefor; and are also the sole judges of the question, what supervision or control over the use should be retained, in order to secure the contemplated public benefits. (*Id.*)

8. But where such lands have already been taken or appropriated without authority, or have been injured by the construction of such canal, and a reservoir of water therefor, by flooding, &c., an act of the legislature, authorizing the appointment of commissioners to appraise the damages already sustained, and making their award, and the payment or tender of the sum awarded, a bar to any action by the owners to recover such damages, is unconstitutional and void. (*Id.*)

9. The party injured has a right to maintain his action, and have a trial by jury, and cannot constitutionally be required, by retroactive legislation, to submit his cause of action to a tribunal not proceeding according to the course of the common law. (*Id.*)

CONTRACTS.

1. The *master of a vessel*, has no lien on the freight nor on the vessel for his wages. The maxim that "freight is the mother of wages," has no relevancy or application whatever to the contract of a master for his compensation, as such. His contract is to be governed by its terms, and by the same rules which are applied to the construction of other contracts. (*Jenkins* agt. *Wheeler*, *ante*, 458; *and see note.*)

2. On a sale of a quantity of wood, the purchaser, after he had drawn away two loads, and while in the act of drawing away a third, discovered that the

quality of a portion of it was different from what the contract called for; *Held*, that he could not rescind the contract of sale, except by restoring, or offering to restore, what he had received under it. (*Woodruff* agt. *Peterson*, 51 *Barb.*, 252.)

2. On an executory contract of sale, the vendee, if he keeps the article, may, *it seems*, recoup his damages, in case of fraud, but not for breach of contract. (*Id.*)

4. A party is not at liberty to remain in active, and recover damages, even of a party who has violated his contract. (*Worth* agt. *Edmonds*, 52 *Barb.*, 40.)

5. Because one party violates his contract, the other is not at liberty entirely to disregard his own interest, and then seek full indemnity by the recovery of damages against the defaulting party. (*Id.*)

6. Parties to contracts should be regarded as contracting with reference to those causes over which human agency has no control; and this element should be regarded as entering into the contract and excusing a failure to perform the same, with like effect as though such an exception was incorporated therein. (*Id.*)

7. To constitute an agreement, it is not necessary that a proposition made by one party to another, by letter, should be accepted expressly. If it is acted upon, and complied with, that is a sufficient acceptance. (*Beardsley* agt. *Davis*, 52 *Barb.*, 159.)

8. A simple request from one person to another, to do an act from which the former can derive no sort of benefit, made under an entire misapprehension of his rights, does not constitute a lawful contract which is obligatory upon him. (*Wells* agt. *Mann*, 52 *Barb.*, 263.)

9. The doctrine is well settled that a court of equity will not set aside an agreement intended to defraud third parties, as between the parties themselves. (*Swest* agt. *Tweedy*, 52 *Barb.*, 271.)

10. A parol agreement, by the owner of land, to employ another to dispose of the same for him, and to pay him a compensation, the measure of which is dependent on the price obtained, is valid and binding. (*Fiero* agt. *Fiero*, 52 *Barb.*, 288.)

11. In an action upon such a contract, brought by the agent, to recover his compensation, evidence to show that the plaintiff was subjected to expenses, in negotiating the sale, by employing another person to aid in conducting the negotiations, and paying him therefor, is competent, as being a part of the *res gestæ*. (*Id.*)

12. An agreement which is designed, or which, in its nature and effect, tends to lead persons who are charged with the performance of trusts or duties for the benefit of others, to violate or betray them, is contrary to public policy, and void. (*Bliss* agt. *Matteson*, 52 *Barb.*, 335.)

13. There is no difference, in principle, whether the trust which it is meant to prevent, is public or private; nor is it material that nothing actually fraudulent or illegal was done, under the contract. It is enough that such is the tendency of it. (*Id.*)

14. Where it was proved that a written agreement between the defendants, for a partnership, with lands for its subject was executed in November, 1861, and there was some proof that the agreement existed in parol in September, previous; *Held*, that it was not erroneous for the judge to leave it to the jury to fix the time during which the agreement existed in parol, if at all, before the writing was executed. (*Chester* agt. *Dickerson*, 52 *Barb.*, 349.)

15. An agreement between a parent and a third person, for the future performance of services for the latter by a minor child of the former, during a period of several years, is void by the statute of frauds, if not in writing. (*Jones* agt. *Hay*, 52 *Barb.*, 501.)

16. But if any services are rendered under such a contract, a recovery may be had for the same, upon a *quantum meruit*, in the absence of any new agreement between the parties, binding upon them, relative to the services of the minor (*Id.*)

17. And if the original agreement is subsequently terminated by mutual consent, and a new agreement made, by which all claims of the father, for the services of his son, under the former, are merged in the new agreement, a recovery may be had for the amount stipulated to be paid by the new agreement (*Id.*)

18. The rule, that it is not competent to alter, vary or affect the obligations of a written agreement by evidence of contemporaneous or prior negotiations of the parties, is too familiar to be questioned. (*Colwell* agt. *Lawrence*, 38 *N. Y.*, 71.)

19. Whether such damages as are stipulated in the gross amount fixed by con-

tract for a failure to perform the same, is in the nature of a penalty, or must be adjudged as liquidated damages, can only be determined by ascertaining the intention of the parties, as gathered both from the language of the contract, and from the nature and circumstances of the case. *(Id.)*

20. Unless the intent of the parties is very clearly expressed, the forfeiture named for non-fulfilment of a contract, where excessive, will not be construed as intended to be liquidated damages. *(Id.)*

21. An attempt, by offer of testimony, by inference to put another construction upon a writing, in plain violation of the rule, that a written contract cannot be waived by parol, is properly rejected. (*Porter* agt. *Spence*, 38 *N. Y.*, 119.)

22. Where, under a contract for a year, as 1859, service is continued in 1860, without any new arrangement, it seems, that the terms of the original contract will be understood to be renewed. (*Huntingdon* agt. *Claflin*, 38 *N. Y.*, 182.)

23. The discharge of an employee, because of habits which disqualify him for the proper performance of his duties, works the same forfeiture as a voluntary abondonment of service. By his own fault, the employee is rendered incapable of the fulfilling his agreement. *(Id.)*

24. Where entire performance of a contract is a condition precedent to the right to recover, and the referee has expressly found that there was not such performance, and specified the particular items of failure, even though these be unimportant, if there has been no waiver of performance, his judgment against a recovery on such grounds cannot be disturbed. (*Brown* agt. *Weber*, 38 *N. Y.*, 187.)

25. The terms of a written contract, for the sale of goods, may be varied by parol, the original sale furnishing sufficient consideration for the modification. (*Blanchard* agt. *Trim*, 38 *N. Y.*, 225.)

26. To the existence of a contract there must be mutual assent, or an offer and consent to the offer. But there can be no assent or agreement to an offer of which the party has not heard (*Fitch* agt. *Snedaker*, 38 *N. Y.*, 248.)

27. Defendants sent to plaintiff, by their teamster, a written order for a load of rye, for which they agreed to settle whenever plaintiff should come to their place. No price for the rye was named by them. Plaintiff delivered a load of rye to the teamster in compliance with the order, but said he must have seventy-five cents per bushel for it and that he must tell the defendants so. The following day he returned for another load, and informed plaintiff that he had delivered the message concerning the price of the rye, and no objections were made, which statements were false. Plaintiff thereupon delivered another load, which was received and used by defendants. The only question in the case is, was there an agreement on part of defendants to pay seventy-five cents a bushel for the rye, or are they liable in the nature of assumpsit only for the market value of the rye, which was fifty cents per bushel? (*Booth* agt. *Bierce*, 38 *N. Y.*, 463.)

28. The answer depends upon the authority of the teamster in the character of agent to bind the defendants. Upon this point, held as follows: 1. That the teamster had no authority whatever to contract for defendant; that his agency was merely manual no more. 2. There was no meeting and concurrence of mind between the parties upon the question of price, such as is essential to an agreement or contract—hence the market value of the rye at the time of delivery is all that the plaintiff can recover. *(Id.)*

29. A contract to deliver a thousand tons of bark per year for five years, commencing on the first day of September, 1854, is performed by delivering a thousand tons within each year, that is, the contractor has the entire year within which to furnish the one thousand tons. (*Curtiss* agt. *Howell*, 39 *N. Y.* 211.)

30. Where, from the language of the contract, there can be no uncertainty as to the true meaning of its terms, it is not competent to give evidence to show, that a different meaning was intended. *(Id.)*

31. A stipulation in a written contract for building, etc, that, "in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect," is not binding, being against the policy of the common law, and having a tendency to exclude the jurisdiction of the courts provided with ampler means to entertain and decide legal controversies. (*Hurst* agt. *Litchfield*, 39 *N. Y.* 377.)

32. Where a special contract has been fully performed, and nothing remains to be done but to pay the money thereon, a complaint founded on the com-

mon counts, as *quantum meruit*, etc., is sufficient. (*Id.*)

33. One who proposes to disaffirm a contract on the ground of fraud, which induced him to enter into it, must do so at once, upon the discovery of the fraud. (*Bruce* agt. *Davenport*, 5 *Abb. N. S.*, 185.)

CORPORATE VILLAGES.

1. The peculiar provisions of the act of 1847, prescribing the only means by which the corporate power to make or repair sidewalks can be exercised, and limiting the authority of the trustees, and of the electors themselves, on that subject, leave no room to imply a contract by the corporation to make sidewalks, or keep them in repair, otherwise than as the statute prescribes. (*Herrington* agt. *Village of Corning*, 51 *Barb.*, 396.)

2. It was not the intention of the statute to confer upon the corporations formed under it, or upon their officers, an absolute power to make or to cause to be made and kept in repair sidewalks along their streets, thus involving taxation to an unknown extent; but the subject is referred to the discretion of the electors in their collective capacity, who by their action may impose upon the trustees the duty of causing any particular sidewalk to be made or repaired. (*Id.*)

3. A village corporation is not liable for personal injuries resulting from the decayed condition of a sidewalk, on the ground that, having constructed the sidewalk originally it is bound to keep it in repair. (*Id.*)

COSTS.

1. Where an action is brought for wrongfully cutting grass and converting the hay from premises which the plaintiffs claim as owners in fee, and entitled to the possession thereof, which possession is alleged to be wrongfully withheld from them; and the defendant in his answer admits the title to the land to be in the plaintiffs as alleged, but claims that he was rightfully in possession of the premises, and had a right to cut and dispose of the hay under the *license and permission of the plaintiffs*, by virtue of an executory contract to purchase the land, the *title to land* does not arise in the case. And if the plaintiffs recover a verdict of $15, only, the defendant is entitled to costs. (*William Earl of Craven* agt. *Price*, *ante*, 15.)

2. Where the plaintiff obtains a verdict at the circuit for $50 or over, and the defendant makes and serves a case, for a new trial, the plaintiff is entitled to costs for: "Making and serving amendments to case $10. On aplication for new trial on a case made before argument $20. For argument $40." (*Selover* agt. *Wisner*, *ante*, 176.)

3. On a motion for a *new trial* at special term, upon a case, the successful party is entitled to costs: "Before argument $20. For argument $40. (*This agrees with the next preceding case of Selover* agt. *Wisner.*) (*Stitt* agt. *Rowley*, *ante*, 179.)

4. A final judgment on a demurrer is a "trial" under section 309 of the Code, and the prevailing party in a proper case, is entitled to an *additional allowance*. (*Lowry* agt. *Inman*, *ante*, 286.)

5. Consequently, where the plaintiffs claim and the defendants counter claim *on the* trial, amounted to over $700, and the plaintiffs recovered $13.72, they were entitled to costs against the defendant. (*Boston Silk & Woolen Mills* agt. *Ewll*, *ante*, 299.)

6. The *district courts in the city of New York* are not courts of justices' of the peace within the meaning of the Code. (*Id.*)

7. Where the plaintiff recovered a judgment of $50 damages against the defendant and $8.05 costs, before a justice of the peace, and the defendant appealed to the county court, specifying in his notice of appeal that the damages should have been for $5, and the costs of the justice, instead of $50:

8. Whereupon the plaintiff served an offer allowing the judgment to be corrected by being entered for $35, instead of $50, damages in his favor, which offer the defendant did not accept; and on the trial of the appeal in the county court, the plaintiff recovered $25 damages, *held* that the *plaintiff was entitled to costs.* (*Baldwin* agt. *Brown*, *ante*, 385.)

9. Had the defendant accepted the offer of the plaintiff, he would have been entitled to a judgment against the plaintiff for costs and disbursements before the justice of $20.05, which would have been more favorable to him than the reduction of the offer on the trial to $10. (*Id.*)

10. An action of ejectment by the vendor to recover possession for default in payment of the purchase money, being a legal action, as defined by the Code, the

defendant, if he succeeds is entitled to costs, although in an equitable action for the same relief he might be charged with costs. (*Cythe* agt. *La Fontain*, 51 *Barb.* 186)

11. It is not necessary, to entitle a party suing in this court, and recovering less than $50, costs, that he should have first brought an action in a justice's court. It is enough, if the facts as proved on the trial, in this court, show it to be the case in which, by section 54 of the Code, a justice has no jurisdiction (*Glackin* agt. *Zeller*, 52 *Barb* 147.)

12. Where there are unliquidated accounts between the parties, the total amount of which, *contested on the trial*, exceeds $100, a recovery by the plaintiff of any amount entitles him to costs. (*Id.*)

13. Where, on appeal to the general term of this court, by an administrator from the decree of a surrogate made on his final accounting, the decree of the surrogate is affirmed, *with costs*, the court not directing the costs to be paid by the appellant personally, for mismanagement or bad faith, they are only by the state represented by him. (*Sheldon* agt. *Williams* 52 *Barb.*, 183.)

14. Such a judgment can not be so changed by an order made at special term, *ex parte*, as to direct that the respondents recover of the appellant a specified sum, "costs and disbursements of the appeal;" whether the effect of such direction be to make the appellant personally liable for such costs or not. (*Id.*)

15. The mere fact, that a trustee as plaintiff in an action does not appear when the case is called, whereby an order of dismissal is taken against him, does not carry with it the legal conclusion of mismanagement or bad faith, under which the ordinary direction dismissing the complaint will be presumed to charge the plaintiff personally with costs. (*Slocum* agt. *Barry*, 38 *N. Y.*, 46.)

16. In order to charge a trustee personally with costs in an action, there should be a specific application for such an order, founded upon a notice to the other party, in order that he may have an opportunity to repel the charge of mismanagement, or the imputation of bad faith. (*Id.*)

17. It is the common experience to apprise the jury of the effect of their verdict upon the parties in respect to the question of costs, and the practice has been expressly and repeatedly affirmed (*Waffle* agt. *Dillenback*, 38 *N. Y.*, 53.)

18. The provisions of section 146, chapter 480. Laws of 1847, which declare, that, where officers of school-districts are prosecuted for any act performed under, or by virtue of, their office, and which might have been the subject of appeal to the state superintendent, no costs shall be allowed to the plaintiff where the court shall certify, that, upon the trial of the cause, the defendants acted in goodfaith, are not abrogated, repealed or superseded by sections 304 and 468 of the Code. (*Clarke* agt. *Tunnicliff*, 38 *N. Y*, 58.)

19. The certificate of the court, that the school officers appeared, upon the trial of the cause, to be acting in good faith, is a bar to the recovery of costs by the plaintiff, though he have judgment in his favor; and the certificate applies to all the costs, including those upon a motion by the defendants for a new trial, as well as to those upon the trial itself. (*Id.*)

20. Defendants sued on the same instrument, who both appear by the same attorney, and interpose substantially the same defense, although by separate answers, can be allowed only one bill of costs, on prevailing in the action. (*Atkins* agt. *Lefever*, 5 *Abb. N. S.*, 221.)

COUNTER-CLAIM.

1. *Counter claims*, under the Code since 1852, embrace both *set-offs* and *recoupments* as they were understood prior to that time. (*Boston Silk and Woolen Mills* agt. *Eull*, *ante*, 299.)

2. Therefore, a defendant now may not only defeat a plaintiff's claim by recoupment, if his demand is sufficient, but may recover a balance, notwithstanding the former rule, to the effect that in cases of recoupment, as opposed to a set off, a defendant could only use his claim to *defeat* that of the plaintiff. (*Id.*)

3. Where the court below decides, as a matter of law, that the counter claim set up by the defendant could not be allowed in the action without the ground of such ruling being stated, it is presumed, that the ruling was against the allowance of the counter claim, in any view of the evidence. (*International Bank* agt. *Monteath*, 39 *N. Y.*, 297.)

4. In such case, if it appear from the case, that a counter claim might have been allowed in such action, the ruling will be deemed to be erroneous. (*Id.*)

Digest.

COVENANT.

1. A lease of a *theatre* for a specific term and at a specified rent, which contains a covenant that "at the expiration of such term, there shall be a renewal *for such further time as shall prove mutually profitable*," the lessor to receive a share of the net profits in lieu of rent, is a covenant which cannot be enforced by an action for specific performance—*it is void for uncertainty.* (*Lloyd* agt. *Worrell. ante*, 75.)

2. It is well established, that, under a mere covenant in a deed, providing against certain constructions, which may be noxious or offensive to neighboring inhabitants, those who have suffered from a breach of the covenant, though not parties to the deed, will be afforded relief in equity. As the covenant is intended for their benefit, it will be deemed to have given them an easement in the land, and a court of equity will interpose to give them relief, by injunction against its infraction. (*Gibbert* agt. *Peteler*, 38 *N. Y.*, 165.)

3. Where a deed contains a covenant, to the effect, that the grantee will not erect, or suffer to be erected, any structure, whereby the view or prospect of G. (not a party to the deed) shall be obstructed, and, in case of breach, the premises to be forfeited to the grantor, for the use of G., his heirs and assigns; *held*, that the language is as positive as could be employed to make the land decribed, an estate upon condition, and it is not the less valid, because the thing prohibited is declared to be for the protection or convenience of a person occupying adjoining land. (*Id.*)

4. Hence, where a subsequent owner of lands so conveyed, agrees with another to convey the same to him with clear title, the grantor is not bound to accept a title incumbered with the above restrictions. (*Id.*)

5. Where the conveyance, under which a party holds, refers to a deed of the same premises, which contains a restrictive clause, and which is on record, it will be presumed that he has notice of the restrictive covenant. (*Id.*)

6. In an action upon a covenant of guaranty by which the covenantor becomes surety for the punctual payment of the bond of other persons, and undertakes that, if default shall be made by them, he will pay and fully satisfy the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiffs the amount due, but that he should pay and satisfy, or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay to the plaintiffs the amount. (*Farnham* agt. *Mallory*, 5 *Abb., N. S.* 380.)

7. The covenant that the whole amount of a judgment is due is not to be construed to mean, that no one of the judgment debtors has been released. (*Bennett* agt. *Buchan*, 5 *Abb., N. S.*, 412.)

CRIMINAL LAW.

1. Upon an indictment for selling unwholesome beef, knowing it to be such, the defendant's counsel requested the judge to charge the jury, that, if they should find that the beef was purchased as an article of merchandise, and not for domestic consumption, then the indictment could not be sustained. The judge refused so to charge, and the jury found the defendant guilty. The general term reversed the judgment, on the ground of error in the refusal of the judge to charge as requested. *Held*, that the refusal was *not error*, and the conviction, being properly found, must be affirmed. (*The People* agt. *Parker*, 38 *N. Y.*, 85.)

2. An indictment for murder in the common law form, charging the killing with malice aforethought, is good, notwithstanding our statute has divided the crime of murder into different degrees; and a verdict finding the accused "guilty, as charged in the indictment," is a conviction of murder in the first degree. (*Kennedy* agt. *The People*, 39 *N. Y.*, 245.)

3. The statute is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction. (*Id.*)

4. An indictment, charging the killing of T. H. *alias* T. J., is not defective for uncertainty nor duplicity. That expression does not import a killing of "either T. H. or T. J., but a killing of T. H., otherwise called or known as T. J." The omission of the Latin word "*dictus*" is not material. (*Id.*)

5. On a trial for murder, it is competent to prove, that the deceased had money in his possession shortly before his death; how far back the inquiry should extend, will depend upon the circumstances, character, business and habits of the deceased, which may render it

more or less probable, that he retained it in his possession. *(Id.)*

6. But declarations of the deceased some weeks before his death, that he had no money, are not admissible as proof of that fact. *(Id.)*

7. To charge in an indictment, that the defendant, on the 1st day of June, and on divers other days and times between that day and the day of the finding of the indictment (September 12), sold by retail to divers citizens of this state, and to divers persons to the jurors unknown, strong and spirituous liquors, to wit, three gills of brandy, three gills of rum, three gills of gin, &c., is not to charge several distinct offenses in the same count, in any such sense as to invalidate the count or the indictment. (*Osgood* agt. *The People*, 39 *N. Y.*, 149.)

8. It is unnecessary to name in the indictment, the particular person to whom the defendant sold the liquor constituting the offense. *(Id.)*

9. It is sufficient, under the statute (*Laws* 1851. *ch.* 504), to establish the guilt of the defendant, indictment for permitting gambling in his room or office to prove that he occasionally knowingly permitted gambling in his office It is not necessary to prove that he habitually did so, or that gambling there was a principal business. (*Hitchins* agt. *The People*, 39 *N. Y.*, 454.)

10. In order to convict of larceny, the jury must be satisfied, that the *taking* of the property was with a felonious intent; it is not sufficient to find, that, after the taking, it was converted to the use of the prisoner with a felonious intent. It is necessary to find that the intent to steal existed at the time of the taking—"*cepit animo furandi.*" (*Wilson* agt. *The People*, 39 *N. Y.*, 459.)

11. To sustain the plea of a former acquittal as a defense to an indictment, it must appear that the party was "put in jeopardy" by the former trial. (*Canter* agt. *The People*, 5 *Abb. N. S.*, 21.)

12. A plea of an acquittal, alleging that it was "on the ground of a variance between the indictment and the proof, the variance being that the proof failed to show" certain facts necessary to establish the offense alleged, is not sufficient, under the provisions of the Revised Statutes, as a bar to a trial and conviction upon a subsequent indictment for the same offense. *(Id.)*

13. A felony can be charged in different ways in an indictment, for the purpose of meeting the evidence, as it may come out upon the trial; and, if this is done in good faith, it is not error for the court to refuse to compel the prosecution to elect upon which count they will claim a conviction. (*Laneyan* agt. *The People*, 5 *Abb. N. S.*, 113.)

14. A general verdict of guilty, rendered upon a common law indictment for murder, authorizes, under the laws of this state, a judgment and sentence for murder in the first degree. *(Kennedy* agt. *The People*, 5 *Abb., N. S.*, 147.)

15. When a person is known by two names, and the pleader, for greater certainty, deems it necessary to aver such fact in an indictment, it is immaterial which of the two names is first stated, and which was the real name. It is sufficient if the pleading designates the names by which the person intended may be known with certainty, irrespective of the priority of the names in the statement. *(Id.)*

16. The laws of 1840 (*page* 73, *ch.* 100) and the laws of 1856 (*p.* 251, *ch.* 158) in connection with the Revised Statutes, recognize and authorize imprisonment in three different places for the crime of *grand larceny*, viz: state prison, penitentiary and house of refuge. Offenders over twenty-one are to be imprisoned in the state prison; those between twenty-one and sixteen, in the state prison or penitentiary at the discretion of the court; those under sixteen in the state prison or house of refuge, at the discretion of the court. (*The People* agt. *Keeper of Penitentiary, &c.*, *ante*, 494.)

17. When the court under its power of discretion has determined the age of the offender, and designated the place of his imprisonment, and passed sentence upon him, the exercise of that discretion and that determination is made the final adjudication of a competent court and can no more be inquired into on *habeas corpus* than can the guilt or innocence of a prisoner who was either pleaded, or been found by the jury, guilty of the offense charged in the indictment. *(Id.)*

18. If error is committed in such determination it can only be corrected, if at all, by writ of error or a motion for a new trial, when the court has power to entertain such motion. *(Id.)*

DAMAGES.

1. In an action to recover damages for injuries done to the plaintiff's premises by water, in consequence of the diversion

of a stream from its channel by the defendants, in constructing a culvert, the legal rule of damages has no reference to the cost of removing a bar of gravel carried there by the flood. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendant's acts. (*Easterbrook* agt. *Erie Railroad Co.*, 51 *Barb.*, 94.)

DEED.

1. Where a description in a deed defines the boundary of the premises along the line of a given street, title vests in the grantee to the middle of the street, subject, of course, to the public use or the same as a highway. (*Sherman* agt. *McKeon*, 38 *N. Y.*, 266)

DEFENSE

1. The fact, that the plaintiff, as assignee of the claim upon which action is brought, is an attorney-at-law, practicing in New Jersey, is no defense to the action. (*Winfield* agt. *Potter*, 38 *N. Y.*, 67.)

2. While it is, doubtless, good law that one partner cannot replevy property from the bailee of the other partner, yet the facts upon which such defense is predicated should be alleged. Hence, where the answer, in an action to recover personal property, admits ownership in the plaintiff without qualification, and only denies possession absolutely in the defendant, also the alleged value and a demand, a question is not presented to which the above rule of law can be applied. The ownership of plaintiff being admitted—by not being denied—in the pleadings, and possession in defendant being found by the jury on the evidence, the case is closed against a legal defense, on the ground of joint ownership by the plaintiff and a partner, and of possession under authority of one of the partners. (*Tell* agt. *Beyer*, 38 *N. Y.*, 161)

3. In an action against a sheriff for the escape, through his negligence, of a judgment debtor, against whose person an execution had issued, and under which he was held in custody, the defense, that the plaintiff in the former suit was not the proper party to bring the action, is not available. The recovery of the judgment in that case is conclusive as to the right of the plaintiff thereto, upon the parties in this action. (*Richtmeyer* agt. *Remsen*, 38 *N. Y.*, 206.)

DISTRICT COURTS.

6. The *district courts in the city of New York* are not courts of justices' of the peace within the meaning of the Code. (*Boston Silk & Woolen Mills* agt. *Bull*, *ante* 299.)

DIVORCE.

1. *A limited divorce* may be granted under the Revised Statutes, to a married woman for cruel and inhuman treatment by the husband; and also for such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to live or cohabit with him. (*Davies* agt. *Davies*. *ante*, 45.)

2. It is the duty of the wife, if consistent with her safety, to live with her husband, and bear with his infirmities and ill temper -husband and wife should not be separated lightly or without good cause. But if his conduct be unbearable, and the wife be in reasonable apprehension of personal violence and discomfort, and the conduct of the husband be inconsistent with her safety, she may leave him, and this court will grant the relief demanded. (*Id.*)

3. Where the wife, after the ill treatment of the husband towards her, continues to live and cohabit with him as before, the former ill treatment is condoned, and a limited divorce will not be granted therefor; but, if after such condonation, the ill treatment is continued, though of less degree, the original cause of action is revived, and will be deemed in life for the purposes of decreeing separation upon the whole case as presented. Her case, under such circumstances, rests upon a review of all his conduct towards her during their married life. (*Id.*)

4. The question in these cases is had the wife reasonable ground to apprehend personal injury? Was she exposed to physical injury from continued cohabitation? And in this connection, words of menace accompanied by a probability of bodily violence will be sufficient. (*Id.*)

5. In cases of this character, though the wife be not entirely faultless, and though her language and conduct may have been in many particulars irritating and provoking, still, all due allowance is to be given to human frailty. The conduct of the husband and his treatment, as provocative of her conduct and behavior; the position and

standing in life, of the parties, their degree of refinement, and all the circumstances of the case as presented, are to be examined and considered by the court in granting or refusing the relief prayed for in the complaint. (*Id.*)

6. Where, in an action by a husband against his wife, to obtain a decree declaring void a marriage between them, for the reason that the defendant at the time of such marriage, had a husband living, and from whom she had never been divorced, the facts alleged in the complaint are undisputed the marriage between the parties is absolutely void, and no court can hesitate to decree the nullity of the marriage. (*Appleton* agt. *Warner*, 51 *Barb.*, 270.)

7. Where the defendant is not the plaintiff's wife, and she admits the facts showing she is not, and does not claim to be such, the power to grant a counsel fee and alimony should not be exercised in her favor. (*Id.*)

8. Should the court finally determine as a matter of discretion, that it will not decree the nullity of the marriage, still there is no legal marriage. Still the defendant is not the plaintiff's wife. This being clear at the commencement of the controversy, the plaintiff is under no obligation to support the defendant or to pay her counsel. (*Id.*)

DONATIO MORTIS CAUSA.

1. Gifts *mortis causa*, though not favored in law, are sustained in cases where the essential conditions are fulfilled, which are, contemplation of death, clearly expressed intent to give *in presenti*, delivery of the subject-matter, and death of the donor without revocation of the gift. (*Champney* agt. *Blanchard*, 39 *N. Y.*, 111.)

EJECTMENT

1. In an action of ejectment, brought by a vendor, or his grantee, to recover lands in the possession of the defendant under an executory contract of sale, for default in the payment of one of the installments at the time fixed upon by the contract; *held* that the defendant might interpose an equitable defense, and the court would consider the case in the same view as though the defendant had commenced a cross action and applied for an injunction. (*Cythe* agt. *La Fontain*, 51 *Barb.*, 186.)

2. Where an action of ejectment is brought against one in possession as tenant of an other, and the defendant gives notice of the suit to such other person, as required by statute, the latter, in the absence of any proof to the contrary, will be deemed to have assumed the defense of the action, and will be concluded by a recovery therein against the defendant. (*Van Alstine* agt. *McCarty*, 51 *Barb.*, 326.)

3. If he is not concluded by the judgment in the ejectment suit, on the ground that he was the real party defending the action, and bound by the recovery therein, he will be liable for the rents and profits, at common law after the plaintiff has recovered possession, where it appears that he has actually received such rents and profits. (*Id.*)

4. The owner of lands conveyed the same to the defendant's grantor subject to an annual rent charge thereon, and the right of re-entry in case of non-payment of rent. The grantor died, leaving six heirs. *Held* that one of such heirs could maintain an action of ejectment to recover possession of her one sixth of the lands, as such heir, for non-payment of rent, without joining the owners of the other five sixths as plaintiffs. (*Cruger* agt. *McClaughry*, 51 *Barb.*, 642.)

5. Where, in an action of ejectment the plaintiffs claimed to recover the premises in question upon the ground that S. died seised and in possession of the premises, and being thus seised and possessed, he by his will devised them to his son, for life, and after his decease, to his sisters, from whom the plaintiffs, were descended; *Held* that to entitle the plaintiffs to recover, they must establish title in S.; and that without such proof they could not recover, even though the defendants were without title. (*Enders* agt. *Sternbergh*, 52 *Barb.*, 222.)

6. In an action of ejectment for the non-payment of rent, where the referee finds as a matter of fact, "that the defendant was at the commencement of the action, and has been for years prior thereto, the owner in fee of said premises, and held the same immediately of the state, and that the contract upon which the action is brought was one of the assignments by means whereof the title came to the defendant, and that the plaintiff had, when the action was commenced, no estate or interest in the premises," but at the same time finds as a conclusion of law, that the plaintiff is entitled to recover the possession of the premises, the conclusion of law is unwarranted by, and

in conflict with the facts found. (*Van Rensselaer* agt. *Barringer*, 39 *N. Y.*, 9.)

7. But, the conclusion of law being in conformity with the law as settled by the decisions of the courts, the findings of the facts must be presumed erroneous, and furnish no ground for disturbing the judgment. (*Id.*)

8. That the defendant held the fee by a tenure immediately of the state as, all our lands are held, was not inconsistent with his holding of Van Rensselaer under the conveyance in question. (*Id.*)

9. In an action of ejectment, brought to recover the possession of lands held by the defendant under a grant in fee reserving rent, proof of conveyance, forty years before the commencement of the suit, to one from whom the plaintiff derives title, proof of her grant reserving rent, and proof of the payment of rent to her heirs at law, and subsequent grantees, by the successive tenants, including the defendant, sufficiently establishes the title of the original grantee as against the tenants in possession. (*Hosford* agt. *Ballard*, 39 *N. Y.*, 147.)

10. Where a grant in fee reserving rent contains the express condition, that, if the rent shall be unpaid at the time appointed for the payment thereof, then the grant and the estate demised are to be void, determine and cease, and thereupon it shall be lawful for the grantor, his heirs and assigns, to re-enter, &c., it is not necessary for the plaintiff, in the ejectment brought for a breach of such condition, to prove a demand of the rent. (*Id.*)

11. The common law rule, requiring such demand on the premises, on the day, and for the precise amount, is abrogated by the statute, which makes the commencement of the action of ejectment stand in place of such demand; and this statute applies as well to a grant in fee reserving rent, as to a lease for years, or other term less than a fee. (*Id.*)

12. The statute of 1846, requiring fifteen days' notice of an intention to re-enter, does not apply to a grant in which the right to re-enter arises on default of payment by the tenant, but only where such right depends on the sufficiency of goods whereon to distrain. (*Id.*)

ESTOPPEL.

1. A party setting up an estoppel, must be personally misled or deceived by the acts which constitute the estoppel alleged; and he must have a particular interest in such acts, more than the public at large. He must have trusted to them, and confided in them, in some particular business transaction. (*Garlinghouse* agt. *Whitwell*, 51 *Barb.*, 208.)

2. The mere circumstance that one has made improvements upon the land of another, under an honest, but erroneous belief that he was the owner, forms no ground for transferring the title of one person to another; nor for estopping the owner from reclaiming his own. (*Raynor* agt. *Timerson*, 51 *Barb.*, 517.)

3. Possession and claim of title under an erroneous location, short of twenty years, is not sufficient to establish title in the occupant, as against a valid paper title; unless such location was made, and the possession under it has been continued, under such circumstances as to estop the party having the paper title from asserting his claim against such occupant. (*Id.*)

4. One who has covenanted with executors, as such, that third persons shall satisfy and discharge a mortgage, is thereby estopped from denying the right of the executors to sue on such covenant, in their representative capacity. (*Farnham* agt. *Mallory*, 5 *Abb. N. S.*, 380.)

5. In such an action, their interest in the enforcement of the covenant may be assumed. (*Id.*)

EVIDENCE.

1. It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement, that it be shown the witness has no recollection of the matters stated therein, independent of the written paper. If he has such recollection, the evidence is inadmissible. (*Meacham* agt. *Pell*, 51 *Barb.*, 65.)

2. Where a witness testifies fully to an interview between the parties, at which an agreement was entered into, a memorandum of the terms of such agreement, made by him at the time, is not admissible to *corroborate* the witness. (*Id.*)

3. A party to an action should not be permitted to give in evidence a memorandum made by *himself*, to prove the terms of a contract between him and his adversary, which has been made by him privately, and never shown to the other party. Such a rule of evidence

would open a door to frauds of the worst character. (*Id.*)

4. Where improper evidence is received although objected to by the other party, but subsequently and before the testimony is closed, the judge orders the evidence to be struck out, and directs the jury to disregard it, the error is not cured by such order and direction if the verdict cannot be supported except by such evidence. (*Mandeville* agt. *Guernsey*, 51 *Barb.*, 99.)

5. Where there is a variance between the complaint and the proof, in regard to the time of delivery and acceptance of property, which has not misled the defendant, the court in the exercise of its discretion, may direct the jury to find the fact according to the evidence. (*Babbett* agt. *Young*, 51 *Barb.*, 466.)

6. Where there is nothing in the body of a written agreement, or in the form of a party's signature, to indicate that the obligation thereby created was intended to be any other than a personal obligation on his part, parol evidence is inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed it as their agent. (*Id.*)

7. *It seems* the rule is otherwise where it appears in the body of the instrument, or from the signature of a party thereto, that he was acting for others and intended to bind them, and not himself. (*Id.*)

8. Where a party sued upon an agreement executed by him in his own name, does not claim, upon the trial, to recoup any damages except such as have accrued to third persons, by the plaintiff's alleged breach of the agreement, and they are not shown to be parties to the agreement, an offer to prove a counterclaim in their behalf, is properly overruled. (*Id.*)

9. Conversations and declarations of a testator, in favor of the executor are never allowable in actions between the executor and third persons, unless under some peculiar circumstances. (*Chase* agt. *Ewing*, 51 *Barb.*, 597.)

10. In order to render opinions as to the value of a dog competent evidence, it should first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed, or possessing some peculiar qualities which make him an animal usually vendible at some approximately regular price. (*Brown* agt. *Hoburger*, 52 *Barb.*, 15.)

11. In an action against an overseer of highways, for causing embankments or breaks to be made across the road, on a hill, whereby the plaintiff was thrown from his wagon and injured, evidence offered by the plaintiff to show that within a week of the time of the accident, a person was upset at the same place, and a lady was thrown out of the wagon in which she was; and that about the same time the plaintiff was injured, or within two or three months of that time, several accidents of a similar kind occurred, from the same cause, at the same place, is not admissible. (*Sherman* agt. *Kortright*, 52 *Barb.*, 267.)

12. Where in such an action the plaintiff alleged, in one count of his complaint, that the defendant was fully informed and knew of the danger of the embankments placed by him upon the highway and that he *willfully* and *wrongfully* persisted in erecting and maintaining them, across the highway; *Held*, that an issue being raised as to the defendant's malice and intentions, it was not erroneous to permit him to prove that he had no malice or ill-will, or intention to injure the plaintiff. (*Id.*)

13. Parties committing a fraud in the sale of land, are jointly and severally liable. Evidence, therefore, which implicates one, and not all, is admissible, and, if sufficient, will justify a verdict against one alone, (*Chester* agt. *Dickerson*, 52 *Barb.*, 349.)

14. Evidence of the continuance of such fraudulent acts, by one of the partners, between the making and completion of a contract for the purchase of the land by the plaintiff, is admissible, in an action against all of them, for the fraud. (*Id.*)

15. A partnership may exist with lands for its subject. Such a partnership may be created by parol. (*Id.*)

16. A judgment is conclusive upon the parties thereto, only in respect to the grounds covered by it, and the facts necessary to uphold it; and although a decree, in express terms, professes to affirm a particular fact, yet, if such fact were immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference to such fact. (*The People* agt. *Johnson*, 38 *N. Y.*, 63.)

17. Hence, the record of the court in such case, cannot be admitted as evidence in a subsequent suit between the parties to establish the fact thus incidentally affirmed, but not judicially established and made conclusive upon the parties. (*Id.*)

18. In an action for rent, the offer in evi-

dence by the defendant of a judgment in his favor for damages sustained by the failure of the plaintiff to fulfill the terms of his contract as lessor of the premises, was properly rejected; while the evidence offered by the plaintiff of a judgment in his favor, in an action between the same parties, and for the rent of the same premises for a previous quarter, was properly admitted, and was conclusive of the whole question. (*Kelsey* agt. *Ward*, 38 *N. Y.* 83.)

19. An attempt, by offer of testimony, by inference to put another construction upon a writing, in plain violation of the rule, that a written contract cannot be waived by parol, is properly rejected. (*Porter* agt. *Spence*, 38 *N. Y.* 119.)

20. Action against makers of note by owners and holders for value. Answer, denying that plaintiffs are owners and holders of said note, and alleging that they had transferred the same to C.; defendants upon trial give evidence to show, that C. had brought suit upon the note,—of course as owner. Plaintiffs thereupon offer the testimony of B. that he received the note from plaintiffs (a foreign corporation) for collection; that for convenience he sued the note in the name of C. with his consent, which suit was discontinued; that C. paid nothing, and was to pay nothing, for the note. *Held*, that the evidence was properly admitted. (*Hatters' Bank* agt. *Phillips*, 38 *N. Y.*, 128.)

21. Where the only ground for the reversal of a judgment is the admission of incompetent evidence, which is shown, however, to be wholly immaterial, in no wise prejudicial to the appellant, the judgment must be affirmed. (*Watson* agt. *Campbell*, 38 *N. Y.*, 153.)

22. Parol evidence of a contract is properly stricken out, where a letter making the contract of appointment is subsequently produced on the trial. (*Newkirk* agt. *The New York and Harlem R.R. Co.*, 38 *N. Y.*, 158.)

23. Where, by all the testimony in the case, there is left no question as to the facts, there is nothing to submit to the jury. (*Id.*)

24. It seems, that, where an objection to testimony is made in general terms, it will be understood to be to the character of the evidence, and not to the competency of the witness. If the objection is to the latter, it should be specifically made, in order that it may be met and overcome. (*Hoxie* agt. *Allen*, 38 *N. Y.*, 175.)

25. In an action against a wife, for a wrong committed in the presence of her husband, testimony having been given tending to show that the wife acted of her own motion it is competent for the husband to testify as to whether she acted under his direction; and, where his testimony is excluded, it is error, for which judgment against the wife in such action will be reversed. (*Cassin* agt. *Delany*, 38 *N. Y.*, 178.)

26. Error by the exclusion of competent testimony is cured by its subsequent admission. (*Fountain* agt. *Pettee*, 38 *N. Y.*, 184.)

27. In order that objection to evidence be available, upon a motion for a new trial, the party objecting should communicate to the court, and the opposite party, in some form, the grounds of his objection. (*Id.*)

28. Evidence of what a witness swore to on a former occasion is admissible only upon the question of his credibility; it cannot be received as proof of the facts so sworn to. (*McCabe* agt. *Brayton*, 38 *N. Y.* 196.)

29. A motion to strike out the entire testimony of a witness, a portion of which testimony is competent, and a portion incompetent, is properly denied. The motion should be restricted to the incompetent portion—then its denial would be error. (*Id.*)

30. In an action against a sheriff for the escape, through his negligence, of a judgment debtor lawfully in his custody, evidence to show that the prisoner would have returned upon the limits prior to the commencement of the action had he not been prevented by the fraudulent action of the plaintiff, is inadmissible where no such ground of defense is alleged in the answer. (*Richtmeyer* agt. *Remsen*, 38 *N. Y.* 206.)

31. On the trial, the court excluded nearly all the evidence offered by plaintiff to show his damages, and the jury found a verdict for defendants. The judgment is here reversed, specifically upon the ground of error in excluding this evidence. (*Starbird* agt. *Barrons*, 38 *N. Y.* 230.)

32. Under chapter 422, Laws of 1864, section three, it is not necessary to prove, on the trial of an action by or against a corporation, created by or under the laws of this state, the existence of such corporation, unless the defendant shall have alleged, in his answer, that the same is not a corporation. (*Stone* agt. *Western Transportation Co.*, 38 *N. Y.*, 240.)

33. A mere conveyance in writing, reciting the consideration, executed by the

grantor, is not conclusive upon the parties thereto. Either party is at liberty to show the true consideration of the transfer. (*Wheeler* agt. *Billings*, 38 *N. Y.*, 263.)

34. Where the complaint alleges a promise by defendant to pay a certain sum in consideration of a transfer to him of certain property, and this is denied by the answer, the defendant has a right to prove anything that will prove the allegation of the complaint untrue. (*Id.*)

35. It is entirely competent to prove marriage by cohabitation, acknowledgement of the marriage by the parties themselves, reception of them as man and wife by their relatives and friends, and common reputation. See cases cited in opinion. (*O'Gara* agt. *Eisenlohr*, 38 *N. Y.*, 296.)

36. The general rule is, that the proof of the death of a person once living is incumbent upon the party who asserts the death, for it is presumed, that the person still lives until the contrary is proved. See cases cited. (*Id.*)

37. As a general rule, the law presumes the continuance of life, and the death of neither husband nor wife will be presumed, until an absence of seven years without being heard from. (*Id.*)

38. Where, in an action to recover upon a policy of fire insurance, the account books of the party claiming the loss are admitted, without objection, as evidence to show the amount and value of the goods on hand at the time of the fire, and evidence is also admitted to explain alterations in the accounts, with no request from the opposing party to exclude the books as evidence from the jury, on account of the presumption raised against them by the fact of such alterations, it is not error for the court to submit to the jury, for a special verdict, the question, "Have the account books of the plaintiff been falsely or fraudulently altered?" (*Kelly* agt. *Indemnity Fire Ins. Co*, 38 *N. Y.*, 322.)

39. A conversation between witness and prisoners wife, to be competent evidence against the prisoner, must have taken place in his immediate presence and hearing. It should appear from the circumstances, that the prisoner heard the conversation, or at least might have heard it. (*Lanergan* agt. *The People*, 39 *N. Y.*, 39.)

40. A general objection, made before a deposition is read, to all such parts thereof as involved matter of opinion of the witness on the subject of capacity, &c. cannot avail the party. The court cannot be called upon to scrutinize the testimony of witnesses, and decide for the party, to what particulars his objections shall apply. (*Champney* agt. *Blanchard*, 39 *N. Y.*, 111.)

41. Although the evidence of husband or wife is receivable, in a collateral proceeding, for the purpose of proving any fact material to the issue it cannot be admitted, in any proceeding whatever, for the sole and direct purpose of impeaching the testimony of the other. (*Royal Ins. Co.* agt. *Noble*, 5 *Abb. N. S.*, 54.)

42. A declaration made in the presence of one unconscious from sleep or stupor, is not evidence. To be admissible, it must not only be made in his bodily presence, but also within his hearing and understanding. (*Lanergan* agt. *The People*, 5 *Abb. N. S.*, 113.)

EXCEPTIONS.

1. Exceptions to the report of a referee should not be general. They should be specific, and point out the error complained of. (*Loomis* agt. *Loomis*, 51 *Barb.*, 257.)

2. No question can arise upon a bill of exceptions, as to the sufficiency of the complaint, where testimony offered by the plaintiff is received without objection, and the defendant's counsel does not suggest that the complaint is insufficient, until after the plaintiff has proved his case and rested. (*Kern* agt. *Towsley*, 51 *Barb.*, 385.)

3. At that stage of the trial, the defendant may raise the question as to the sufficiency of the complaint, by a motion to strike out so much of the testimony as tends to prove matters not alleged in the complaint. (*Id.*)

4. Defects in the complaint may be stated as a ground for a motion for a nonsuit but if the testimony given without objection is sufficient to establish a cause of action, the motion should be denied. (*Id.*)

5. Exception to refusal of referee to allow an amendment of answer not well taken though the ground of such refusal was erroneous. (*Patchin* agt. *Peck*, 38 *N. Y.*, 39.)

6. Exceptions to testimony, in itself wholly immaterial to any issue in the case, are not available upon appeal (*Porter* agt. *Buckman*, 38 *N. Y.*, 210.)

Digest.

EXECUTION.

1. Where there is *real estate* of a defendant upon which a judgment against him is a lien, and execution thereon is issued during his life-time to the sheriff; if the sheriff on finding no personal property of the defendant returns the execution *nulla bona*, the court, on motion, will order the return of *nulla bona* to be *canceled*, and the execution *taken from the files and returned to the sheriff* to the end that he may proceed and sell the real estate by virtue of it. (*Flanagan* agt. *Tinin*, *ante*, 130.)

2. Where a defendant *dies* after the issuing of execution against his property and within five years after the rendition of judgment and the issuing and return of the execution, no consent or order of the court is necessary on issuing a second execution. (*Id.*)

3. Where, in an action against a constable, for returning an execution unsatisfied, when it might have been collected, the question arises whether certain property of the defendant in the execution was exempt from levy or sale, the affirmative is with the officer claiming the exemption. *Prima facie* all property is liable to execution. (*Baker* agt. *Brintnall*, 52 *Barb.*, 188.)

4. Exemption is a statutory privilege, and is strictly personal. It, therefore, will not avail an officer sued for neglect of duty in not levying on property. (*Id.*)

5. The question of exemption being one that a constable cannot raise in his defense, when sued for not levying and selling, his acceptance of the execution, and a bond of indemnity, with his consent to act upon the execution, and his action so far as to take an inventory of the property of the defendant in the execution, *estops* him, in law, from returning the execution unsatisfied. (*Id.*)

6. *Held*, that conceding the defendant in execution to be a householder, the affirmative of the proposition that she had no property except what was exempt from execution, was upon the person claiming the exemption as a defense.—and there was no error in denying a nonsuit. (*Baker* agt. *Brintrall*, 5 *Abb. N. S.*, 253)

7. The question of exemption is a statutory privilege, and is strictly personal; it therefore would not avail the defendant, if proved (*Id.*)

8. Inasmuch as the question of exemption was one the defendant could not raise in his case, the acceptance of the execution and the bond of indemnity, with his consent to act on the execution, and his acting so far as to take an inventory of the property of the defendant in execution, bound him to go on and act as instructed, and estopped him from returning the execution unsatisfied. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. The executor of a deceased resident of this state to whom letters testamentary here have been issued, can be required to include, in his inventory, assets belonging to the deceased which are situated in another state. (*In the Matter of the Estate of Butler*, 38 *N. Y.*, 397.)

2. The executor is, by statute, required to make an inventory of all the goods, chattels and credits of the testator, without qualification or omission; which inventory must include every species of personal property belonging to the testator. The only qualification by statute is, that the property should have belonged to the testator at the time of his decease, and that the same should have come to the hands or knowledge of the executor. (*Id.*)

EXPRESS COMPANIES.

1. The *Merchants' Union Express Company* of the city of New York, by their articles of association, have no power nor authority to consolidate that company with any other, *without the consent of a majority of the stockholders*. Although the executive committee, and a majority of the trustees of that company, are authorized to amend the articles of association, they cannot make an amendment so as to authorize the consolidation of the company with any other, without the consent of a majority of the stockholders. (*Blatchford* agt. *Ross*. *ante*, 110.)

2. Where, however, under such an amendment of the articles of association, the company has been united with another express company, and the union substantially executed by a transfer of property, and by a large number of the stockholders of the former company, an injunction will not be retained to restrain the new company formed by the merger, from using the property transferred, or from receiving from any of the stockholders of the Merchants' Union Express Company, a surrender of the stock held by them to the new company, and a voluntary compliance of the terms of the agreement on their part. (*Id.*)

3. But in regard to the property not delivered, the injunction should continue, and the directors and executive committee be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other share holders, who are not willing to become members of the new company, by collecting the assessments on the shares of the stock, or in any other manner, until the decision of the case. *(Id.)*

4. It is no objection to the continuance of the injunction that the company which forms the consolidation and merger, and its stockholders severally are not made parties—That company is in no way interfered with by these proceedings. *(Id.)*

5. The decision for the appointment of a *receiver* on the ground of misconduct of the executive committee of the Merchants' Union Express Company in voting for appropriations of money to themselves and others, was reserved until a receiver who had been appointed some time since in regard to the property of the company not involved in the consolidation of the company, should be made a party and appear and answer in this action under a previous order of the court. *(Id.)*

6. A receipt, such as is usually given by express companies for goods delivered to them for transportation, is not subject to any stamp duty, but is covered by the exception in the act of congress of 1865. (*Belger* agt. *Dinsmore*, 51 *Barb.*, 69.)

7. An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property entrusted to it, is the same as that of a carrier. It cannot by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability in whole or in part, if goods are lost through its negligence. *(Id.)*

8. Nor will proof, even, that such notice was brought to the knowledge of the owner, be sufficient to relieve the carrier's liability; but an express contract must be proven. *(Id.)*

FIXTURES.

1. The more sensible rule, in regard to what are to be deemed fixtures, seems to be that if articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles, the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it. *(Hoyle* agt. *Plattsburgh, and Montreal R. R. Co.*, 51 *Barb.*, 45.)

2. The doctrine that the rolling stock of a railroad company in all cases is to be considered as personal property, and as not passing under a mortgage of the road and its appurtenances, not acceded to. *(Id.)*

FORCIBLE ENTRY AND DETAINER.

1. The legislature, in framing the statute relative to forcible entry and detainer, intended to require the party to disclose in his complaint, the nature of his right to the possession, and how and from whom it was acquired, so that it would appear that his right was a legal and valid one. (*The People* agt. *Field*, 52 *Barb.* 198.)

2. An allegation, in the complaint, that the complainant and his grantor have been in the quiet and peaceable possession of the premises for many years, and for more than five years; that he had a good legal right and estate to said premises; and that he still has a legal right to the possession of said premises, is not in compliance with the statute; it being a mere allegation that the right exists, without stating the right. Such a complaint, however, is not so defective as to deprive the officer of jurisdiction. *(Id.)*

3. Possession is *prima facie* evidence of ownership in fee; and if the allegation in the complaint is not sufficiently full and specific, the defendant should raise the question before the judge, to entitle himself to the benefit of the objection. *(Id.)*

4. He may move, at a special term, to dismiss the proceedings for the defect. *(Id.)*

5. The legislature intended to prevent all persons, however good their title or right to the possession of premises, from forcibly acquiring possession of them, and, having peaceably acquired possession, from holding out another, who, at the time of such entry or holding out, was peaceably in possession thereof. *(Id.)*

6. Hence, it matters not how invalid the occupant's right to possession may be; if he is in the peaceable and quiet occupancy of premises, that occupancy cannot be *forcibly invaded*. *(Id.)*

Digest.

7. For all purposes of the statute regulating proceedings in forcible entry and detainer, the person in possession of a house must be deemed to be in possession of the land; for one person cannot be in possession of a house, and another be, at the same time, in possession of the land on which it stands. (*Id.*)

8. Where a building was on the land of the state, without objection from any one, and an individual had the right to keep it there, until the state, or its grantee or lessee, should require its removal: and although he did not occupy or use it, yet he had been in the receipt of the rents and profits, and was about to put it in order, to rent it, went into it whenever he had occasion to do so, and no other person had either the possession, or the right to the possession; *Held*, that he was in the actual possession of the house. (*Id.*)

9. Actual occupancy, at the time of the entry, is not necessary in order to entitle the person injured to proceed under the statute. (*Id.*)

10. The entry, to be forcible, ought to be accompanied by some circumstances of actual violence or terror. If these circumstances exist, they will constitute the entry forcible, though no person be on the premises at the time it is made. (*Id.*)

11. Where the defendant not only entered upon the premises in question, but removed therefrom the building, having with him such a number of persons as would render it unsafe for the occupant to attempt to go again upon the land, and he was told that the defendant had now got possession of the land, and meant to hold it; *Held*, that enough was proved to require the court to submit it to the jury whether there was not a forcible detainer. (*Id.*)

FOREIGN CORPORATIONS.

1. Previous to the Code, foreign corporations were not the subject of litigation in the courts of this state, except when proceeded against by attachment of their property for the collection of a debt or the redress of a wrong. And the Code was not intended to extend that power any further than it existed at that time; although the language of the Code is more general, and might be construed more liberally. (*Howell agt. Chicago and North Western Railway Company*, 51 *Barb.*, 378.)

2. Although it is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and to protect its citizens from fraud, by all means in its power, whether against domestic or foreign wrongdoers, this does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitorial power over them. (*Id.*)

3. The court will not enjoin the directors of a foreign corporation from paying a dividend, where no debt is due to the plaintiff, and he has no claim for redress for any wrong, and his only ground for the injunction is a supposed error on the part of the directors in making the dividend. (*Id.*)

4. For such a cause he must seek redress in the courts of the state where the company was incorporated: unless *fraud* is contemplated, by which the property of stockholders who are citizens of this state is placed in jeopardy. (*Id.*)

5. Although it be not affirmed that in no cases should the courts exercise jurisdiction; yet even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad; where it affects only the internal government of the corporation; where the judgment, if rendered, cannot be in any way enforced against them, except by injunction against individual members of the corporation; and the party has an ample remedy in the state where the corporation has a legal existence; the courts here may well decline exercising an equitable jurisdiction, in such a case. *Per* INGRAHAM, J. (*Id.*)

FOREIGN GOVERNMENTS.

1. Our courts have no power nor authority over *foreign governments* nor over their *property*; notwithstanding such property is within *our territorial limits*. (*Leavitt agt. Dabney. ante*, 264.)

2. Consequently, where funds of a foreign government are in the hands of its agents residing here, for the alleged purpose of being paid to creditors of that government who also reside here, the court here, being without jurisdiction over the principal—the foreign government, has no jurisdiction over its agents here. And being without jurisdiction over the parties, it cannot proceed *in rem* to dispose of its property in favor of resident creditors. (*Id.*)

FRAUDULENT REPRESENTATIONS.

1. The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations must in substance state the representations and aver their falsity and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade in question, and that they did induce such trade, to the plaintiff's injury. *(Barber* agt. *Morgan*, 51 *Barb.*, 116.)

2. Where, in such an action, there was nothing in the first count of the complaint which amounted to an allegation or averment that the defendant made the representations to induce the plaintiff to make the purchase of the property, or with the intent to defraud or deceive him; or that such representations in fact induced the purchase of the property; *Held*, on demurrer, that the count was defective, in these particulars. *(Id.)*

3. The second count of the complaint alleged that the defendant represented to the plaintiff that a company, known as "The New York and Santa Fe Mining Company," was a duly organized corporation with an original capital stock of $5,000,000, of the par value of $100 per share; that said company had very valuable mines which it was then working; that the yield of its mines was of immense value; and that said company would certainly pay quarterly dividends in gold, of six per cent; and that the stock of the company was very hard and almost impossible to be obtained, it was so valuable. The complaint then alleged that the defendant affirming and declaring that he knew each and every one of such statements to be facts, induced and advised the plaintiff to purchase of and through him four hundred and eighty shares of the capital stock of said company, which he did purchase, and paid therefor the sum of $13,376; the plaintiff believing and confiding in each and all of the said statements and representations to be true. The count then averred that each and every of said statements were false and were fully known to the defendant to be false:

   1. *Held* that these allegations, together, imputed and implied a fraud purposely and intentionally committed upon the plaintiff, by the defendant, and that the count might therefore be sustained. *(Id.)*

   5. The plaintiff could not be required to prove, on the trial, any thing more than the representations set forth, the fact that the defendant procured and induced him, in reliance upon such representations, to make the purchase of the stock as stated, and then to prove the utter falsity of such statements and representations, and that the defendant knew them to be false when he made them. That this would make out a clear and complete cause of action, except proof of damages. *(Id.)*

6. The sole object of the statute, in declaring void conveyances made with intent to hinder, delay or defraud creditors, &c., is to protect, and prevent the defeat of, *lawful* debts, claims or demands, and not those which are unlawful, or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment, or by the assent of the person against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void. *(Baker* agt. *Gilman*, 52 *Barb.*, 26.)

7. If, at the time a conveyance is made, there is no person competent to question its validity, the title will vest in the grantee absolutely, as against all the world. Subsequent creditors of the grantor cannot reach it, in such a case, as the foundation upon which their rights are held to attach to property once owned by their debtor does not exist. It is only when a conveyance is void, or voidable, as to creditors, when made, that subsequent creditors of the grantor can attack it on that ground alone. It is not, in such a case, a *bona fide* conveyance to the grantee, either as to prior or subsequent creditors. *(Id.)*

8. The defendant, being sued in actions for slander, retained the plaintiff, an attorney, to defend those actions. Three days afterwards, the defendant conveyed his property to a third person, for the purpose of defeating the claims of the plaintiffs in the slander suits should any be established. Two days after this, the plaintiff was informed of such conveyance, by the grantor, and of its object. Only a small portion of the plaintiff's demand had then been earned. The plaintiff went on defending such actions, without objection, for more than a year, when they were determined in the defendant's favor. *Held* that the credit was not given by the plaintiff upon the faith of the defendant's ownership of the property conveyed and that his demand being embraced in one judgment, recovered nearly two years after the conveyance,

he was clearly a subsequent creditor of the defendant. (*Id.*)

9. *Held, also*, that the plaintiff having, after being informed of the conveyance and the intent with which it was executed, made no objection, and asked for no security, but continued to render his services as attorney as he had begun, with full knowledge of the whole transaction and of its character, he must be held to have assented to it, and to have consented to go on, and trust the defendant, upon the basis of the property being out of his hands and under the ownership and control of another. (*Id.*)

10. A creditor who has trusted his debtor after being fully informed by the latter that he has put his property out of his hands, by a conveyance valid as between him and his grantee, though voidable as to existing creditors, should not be allowed to come into court and claim that such conveyance was fraudulent and void, as to him, on account of such indebtedness. (*Id.*)

11. As to such creditor, a conveyance of that kind would not be fraudulent, in any sense, and cannot be avoided on that ground. (*Id.*)

12. The rule is well settled, that where two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of such persons, as against the other, from the consequences of their misconduct. (*Stewart* agt. *Ackley*, 52 *Barb.*, 283.)

13. Thus, where property belonging to L. A. was conveyed by him to his brother W. A. without consideration, and for the purpose of hindering, delaying and defrauding the creditors of the grantor, and thereupon W. A. and wife conveyed the same property to J. A. *in trust* to apply the income to the use of L. A.'s wife, in such manner as she, with the consent of the trustee, should from time to time direct, with power to dispose of the property, and the proceeds thereof, for her benefit, &c., with remainder to her issue, if she left any, and, if not, then to the plaintiffs the brothers and sisters of herself and her husband; such trust deed being also executed and delivered without consideration, and for the same purpose as the former deed, the *cestui que trust*, L. A.'s wife, knowing, at the time, that such trust deed was executed and delivered for such purpose: and the trustee never took actual possession of the trust property, or any part of it, but the same was, by the assent and direction of the *cestui que trust*, left in the possession of her husband, L. A., and was managed by him;

14. *Held*, 1. That, as an action could not have been maintained by the trustee, claiming under the deed, to recover possession of the property, because the transaction was tainted with fraud, the *cestui que trust* stood in no better position than the trustee; that she being a party to the fraud, and acquainted with its object and purpose, would thus occupy precisely the same attitude as the grantor and the trustee. (*Id.*)

15. That the plaintiffs, after the death of L. A.'s wife, took the place of their predecessor, from whom they derived their title, and were entitled to no greater rights than she would enjoy. That they were not innocent parties, but persons claiming through a fraudulent conveyance, which could not be enforced as between the grantor and grantee and the immediate beneficiary, and, therefore, they could not maintain an action, against the trustee, to recover their interest in the trust funds. (*Id.*)

16. That as the trustee never actually had possession or control of the property, he was not accountable for it as actual trustee. (*Id.*)

17. Although there is a certain trust relation between the shareholders and the directors of a corporation, yet the trust put in the directors usually extends, and in any particular case will be assumed to have extended, only to the management of the general affairs of the corporation, with a view to dividends of profits, and therefore that the trust relation between the stockholder and director extended no further. (*Carpenter* agt. *Danforth*, 52 *Barb.*, 581.)

18. Hence a sale of stock, by a stockholder to a director, or the stock itself, is not so far connected with, or the subject of the trust or trust relation, which is admitted to exist, as to subject the director to, or give the seller the benefit of the principle of equity applicable to the dealings and contracts of parties between whom there is a trust or confidential relation, and to require the purchaser to prove not only that he paid a full and fair price for the stock, but also that he disclosed to the seller every fact or circumstance known to him, and not known to the seller, material on the question of the value of the stock. (*Id.*)

19. Such a case is not a case of constructive fraud; and there is no such trust or confidential relation between the stockholder and director as to make the above principle of equity applicable;

and the sale, if set aside, must be set set aside on the ground of actnal positive fraud. (*Id.*)

20. As between buyer and seller, fraud may be perpetrated by a false and fraudulent representation of a material fact, or by a *fraudulent* concealment of a material fact. (*Id.*)

21. Where there was no evidence to show that on a sale of stock by a stockholder to a director of the corporation the purchaser made any material representation as to the affairs or condition of the company, or of any fact material to the question of the value of the stock, or any false representation of a material fact that induced the sale; or that he either *did* or *said* any thing to mislead the seller, or to divert or prevent him from ascertaining all that could then be known of the affairs, condition and prospects of the company; or from making any inquiry as to any fact material on the question of the value of the stock; or that the purchaser *did* any thing which misled or deceived the plaintiff, or was likely to mislead or deceive him; or which diverted or was likely to divert or prevent him from learning all that he, the purchaser, knew about the value of the stock, or any fact material to the question of value; *Held* that under these circumstances the sale could not be declared void, on the ground of fraudulent representations of material facts or fraudulent concealment of material facts, by the purchaser. (*Id.*)

GAS COMPANIES.

1. A *Gas Company* is not bound to furnish a *separate meter* for each floor of a house, unless the owner or occupants put in separate or independent *service pipes*, to connect with the meter. (*Ferguson* agt. *The Metropolitan Gaslight Co*, *ante*, 189.)

2. As against corporations, the rule of taxation is just, when based upon the amount of capital paid in, or secured to be paid in, after deducting therefrom the amount of such capital actually paid out for real estate; assessing the remaining capital at its actual value, and leaving the real estate to be assessed upon individuals in the town or ward where it is situated. [*The People* agt. *Board of Assessors*, 39 *N. Y.*, 81.)

3. Such is the scheme and mode of taxing the property of corporations, prescribed by the statutes of this state. (*Id.*)

4. The mains of a gas company, under the streets of the city, cannot be regarded as real estate under the statute, for purposes of taxation. (*Id.*)

GOLD COIN.

1. Since the decision of the court of appeals in *The Metropolitan Bank* agt. *Van Dyck*, (27 *N. Y.*, 400,) the constitutionality of the legal tender act is not an open question, in this state. (*Murray* agt. *Gale*, 52 *Barb*, 427.)

2. Whether the case of *Rodes* agt. *Bronson*, (34 *N. Y.*, 649,) be treated as a direct adjudication only upon the construction and effect of a bond which contains the words "lawful money of the United States," or whether it should be recognized as also establishing authoritatively the law applicable to a bond not containing those words, the reasoning of the opinion, upon the latter subject, is convincing, and the views it expresses entirely sound. (*Id.*)

3. Where the condition of an obligation is, not to pay or deliver a specified quantity and quality of gold, but to pay a certain sum of money—whether to be paid in a commodity or not—it is still to pay a certain sum of money. (*Id.*)

4. If the agreement is to pay or deliver a certain quantity and quality of a commodity—gold coin, or anything else—upon failure to perform, the promisee may recover the market value of the article at the time and place when and where it should have been delivered; but where the agreement is to pay so many dollars—whether in a commodity or in money—the amount of money agreed to be paid, and interest, is the only measure of damages for a breach of the covenant. (*Id.*)

5. Where a bond was conditioned to pay "in gold or silver coin of the standard by which the coins of the United States were regulated by the laws existing on the 26th day of May, 1846, the sum of $4000," in three years, with interest; *Held* that the bond, and mortgage given in connection therewith, were paid and satisfied by a payment of the amount, *in legal tender notes*. (*Id.*) [The case of *Rodes* agt. *Bronson*, (34 *N. Y.*, 649), which the decision in this case follows, has been reversed by the U. S. supreme court, 36 *How. Pr. R.*, 365 *and* 444.]

HARBOR MASTERS.

1. The act of the legislature, of May 22, 1862, "defining and regulating the

powers, duties and compensation of the captain of the port and harbor masters of the port of New York," (*Laws of* 1862, *ch.* 487,) by which the captain of the port is directed to set apart, keep and reserve the waters from pier No. 2 to the east side of pier No. 9, East river, for the exclusive use of canal boats, &c., during a certain portion of the year, and the act of May 23, 1867, "to regulate the use of certain slips, piers and wharves on the East river in the city of New York," (*Laws of* 1867, *ch.* 945,) by which the waters from pier No. 2 to the west side of pier No. 10 are set aside for the same use during the same period, and the captain of the port and the harbor masters are directed to prevent all other vessels from lying at said wharves when required for canal boats, are not unconstitutional for the reason that no compensation to the owners of the wharves and adjacent slips is provided, for the loss of gains and emoluments occasioned by the enforcement of such laws; nor because they are within the prohibition that no person shall be deprived of his property without due process of law. (*Roosevelt* agt. *Godard*, 52 *Barb.*, 533.)

2. The act of 1867 having provided rules for the government of the subject embraced in both acts different from, and less restricted than those prescribed by the act of 1862, it is in that respect entirely inconsistent with that act; and so far must necessarily work its repeal by way of implication, and be deemed to have removed the absolute restriction imposed by the previous act. (*Id.*)

3. And giving the act of 1867 that effect, it constitutes a mere police regulation of the business of the harbor, which can neither be regarded as unjust or unreasonable. (*Id.*)

4. Legislation of this nature does not deprive the owners of the wharves to which it relates of any of their rights or privileges. It merely regulates the manner in which they are to be used and enjoyed, for the purpose of promoting the business, security and good order of the harbor. It does not deprive the owner of his property, nor subject it to new uses, or prevent him from devoting it to the lawful uses and purposes for which it has been adapted and designed; but it merely prescribes the manner in which those uses and purposes are to be subserved by it. (*Id.*)

HUSBAND AND WIFE.

1. Where a *personal injury* is committed by the wife alone, both the husband and wife are liable. And where judgment is rendered against both, the *execution* must follow it and direct the collection of damages and costs out of the property of both. (*Flanagan* agt. *Twain. ante*, 130.)

2. A husband who is ready, able and willing to support his wife and who gives her no just cause or occasion to abandon him or leave his bed and board, cannot be compelled to support her elsewhere than at his own house or home, if he has one, by any private person, or by the town or county; whether she be sane or insane. His liability for necessaries provided by other persons, for her support, rests entirely upon the ground of his neglect or default. (*Board of Supervisors of Monroe County* agt. *Budlong*, 51 *Barb.*, 493.)

3. Where a tort or felony of any inferior degree is committed by the wife in the presence, and by the direction, of her husband, she is not personally liable; but, to exempt her, the presence of the husband and his direction must be concurrent. (*Cassin* agt. *Delany*, 38 *N. Y.*, 178.)

4. In an action against a wife, for a wrong committed in the presence of her husband, testimony having been given tending to show that the wife acted of her own motion, it is competent for the husband to testify as to whether she acted under his direction; and, where his testimony is excluded, it is error, for which judgment against the wife in such action will be reversed. (*Id.*)

5. A husband is bound to provide for his wife and children whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. (*Keller* agt. *Phillips*, 39 *N. Y.*, 351.)

6. Ordinarily, he will be presumed to assent to her making, upon his credit, such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision. (*Id.*)

7. But, if he sees fit to destroy such presumption by an express prohibition, no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that supplies become necessary. (*Id.*)

8 In such case, the party seeking to recover in the face of such prohibition, takes the burden of proving the neglect of the husband to supply such necessaries, and, to that end, it is not enough to show that the goods sold were in their nature suitable and ne-

cessary, and that they came to the use of the family, or even that in part they came to the use of the husband himself, unless there be, also, evidence that the husband knew that they were purchased upon credit. *(Id.)*

9. *A fortiori*, it is error to reject evidence tending to show that the husband, after such prohibition, furnished his wife money and means for her support, and that of the family. *(Id.)*

INFANTS.

1. A justice of the peace has no jurisdiction to proceed in an action against an infant defendant after service and return of the process, until a guardian has been appointed. Until this has been done, he has no right to receive the complaint of the plaintiff, or the answer of the infant defendant. (*Harvey* agt. *Large*, 51 *Barb.*, 222.)

2. If the infant does not apply for the appointment of a guardian, the plaintiff should apply, and see to it that a guardian is properly appointed. (*Id.*)

3. Where an infant, sued in a justices' court, does not plead his infancy, but proves it on the trial, the proper judgment for the justice to render is a judgment of dismissal, stating the reason, viz., that the defendant is an infant, and that no guardian has been appointed. If he renders a judgment against the defendant it will be void. (*Id.*)

4. Where such a judgment of dismissal is rendered, the proceedings in that action will not be a bar to a second action. (*Id.*)

5. Where a general guardian of infants is also appointed their special guardian for the sale of their real estate, and having sold the same, he receives the interest on the fund arising from the sale, he will not be adjudged to have received the same in his capacity of general guardian, or in any other capacity than that of special guardian; where it appears that nothing was necessary for the support and maintenance of the infants. (*Swartwout* agt. *Oaks*, 52 *Barb.*, 622.)

6. Where the securities, in such a case, make the interest as well as principal payable to the special guardian, as such, the legal presumption must be that he received both principal and interest in the way, and in the character, in which they were made payable, in the absence of any evidence to the contrary. (*Id.*)

7. Where an order for the sale of the real estate of infants, required the special guardian to invest the fund arising from the sale in securities upon unincumbered real estate, of double value, payable one half to each infant when he should arrive at the age of twenty-one, with annual interest, without specifying in whose name the securities should be taken; *Held*, that it was no violation of the order of the court, or of the duty of the special guardian, to make the securities payable to himself as such special guardian. *(Id.)*

8. But that the special guardian had no authority to invest the proceeds of the sale in bonds and mortgages payable to himself, as "guardian," in five years, with annual interest. That he had no right to receive the principal at all, without the order of the court, after its investment; and that he was prohibited by rule of court from receiving, without the order of the court, any more of the interest or income, than might be necessary for the support and maintenance of the infants. (*Id.*)

9. And the referee having found that the infants lived with, and were supported by, an uncle, without charge; *Held*, that the condition on which the guardian's right to receive the interest, or a portion thereof, without the order of the court depended, did not exist. *(Id.)*

10. And the special guardian having received and converted to his own use, the interest as well as the principal, in clear violation of his trust, and of his obligation as special guardian; *Held*, that his sureties were liable to the infants, for both. (*Id.*)

INJUNCTION.

1. This court has the power at general or special term, to *revive and continue an injunction* in its discretion, in all proper cases, and upon such terms as to security and otherwise as it may deem just. But it should be upon the giving of a *new undertaking* in the same manner as upon the granting of the original injunction. (*Disbro* agt. *Disbro, ante*, 147.)

2. In this case a motion on the part of the plaintiff is granted reviving the injunction and stay of proceedings, pending an appeal to the general term, from a judgment on the report of a referee *dismissing the complaint*, on the plaintiff's giving a new undertaking in proper form, &c. (*Id.*)

3. On an order of confirmation of a re-

port of a referee fixing the amount of *damages* the defendant is entitled to upon the dissolution of the plaintiff's *injunction*, and deciding that the defendant is entitled to recover the same of the plaintiff, it is improper to enter up *judgment* against the plaintiff and his sureties in the undertaking, upon the report of the referee, for the amount of such damages. (*Patterson* agt. *Bloomer*, *ante*, 450.)

4. The defendants' remedies against the sureties, are either an action on the undertaking, or by a reference on application to the court, for an order directing the payment of money. (*Id.*)

5. The plaintiff not having signed the undertaking, in this case, the proper remedy against him, is by an order of the court directing him to pay the damages. (*Id.*)

INN-KEEPER.

1. The duties of an *innkeeper*, as such, are due only to his *guests*. (*Coykendall* agt. *Eaton*, *ante*, 438.)

2. To constitute one a guest, it is not necessary that he be at the inn *in person*. It is enough that his *property* be there in the charge of his wife, or servant, or agent who is there in his employment or as a member of his family: (*Id.*)

3. But they must be there in such way that the law implies the property, while there, to be in *his possession*, and not in the possession of the person who is there with it as his bailee. (*Id.*)

4. Where the owner of the property hires it out or lends the use of it, to the person who takes it to the inn; in either case, the rule is, that the owner can claim only the ordinary rights of owner, as against a subsequent bailee, and not the special rights which belong to a guest, unless such special rights are expressly transferred to him by his bailee. (*Id.*)

5. A *bailee* for hire or a gratuitous bailee, who delivers the goods he has as such bailee, to a wrong party, or who, after they are demanded of him does not in any way account for their loss, is liable to the true owner for their value. (*Id.*)

6. And if the defendant is liable for *gross negligence* as such bailee, the action for not delivering the property on a proper demand being made, can be maintained either by the bailee from whom the defendant received it, or by the real owner. (*Id.*)

7. Where there is some evidence given, going to prove that the person in the employ of the innkeeper, who received the property into his possession for the innkeeper, had authority from the innkeeper so to do, it is error to nonsuit the plaintiff, in an action against the innkeeper as bailee. Such evidence should be submitted to the jury. (*Id.*)

8. Under a statute providing that whenever the proprietor of any hotel, inn, &c. shall provide a safe, for the safe keeping of any money, jewels, &c. belonging to guests, and post a notice thereof in the rooms, and a guest shall neglect to deposit his money, &c. in such safe, the proprietor of the hotel shall not be liable for any loss of such money, &c. sustained by such guest, by theft or otherwise: if after the proprietor of a hotel has furnished a safe and given the required notice thereof, a guest neglects to place his money, &c. in the safe, but keeps them in his own care, such proprietor is not responsible for their loss, to any amount, or for any value; not even for a sufficient amount of money for the guest's ordinary travelling expenses. (*Hyatt* agt. *Taylor*, 51 *Barb.*, 632.)

INSOLVENT DEBTORS.

1. Creditors residing out of the jurisdiction of the state at the time the debt is contracted, are not to be affected in their rights by the insolvent laws of this state. (*Soule* agt. *Chase*, 39 *N. Y.*, 342.)

2. The fact, that they seek to avail themselves of the courts of this state to enforce their rights under such extra territorial contract does not render them amenable under the insolvent laws of this state. (*Id.*)

3. But, where a foreign creditor voluntarily makes himself a party to proceedings under the insolvent laws of the state, which discharges the debts, and he accepts a dividend under the law, he is estopped from denying the regularity and validity of such proceedings. (*Id.*)

4. The provisions of the revised statutes, allowing voluntary assignments by insolvents for the purpose of exonerating their persons from imprisonment, are not applicable to the case of a debtor imprisoned on proceedings under the act of 1831, known as the "Stillwell act." (*People* agt. *O'Brien*, 5 *Alb., N. S.*, 223.)

Digest.

INSURANCE CORPORATIONS.

1. If an *insurance company, being insolvent*, distributes its *capital* among its stockholders, thus placing it beyond the reach of its creditors, such act is a *fraud* upon the creditors, and falls directly within the provision of the statute (*Laws of* 1858, *p* 506, § 1) which provides: That the receiver of an insolvent corporation may, for the benefit of creditors, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor. (*Osgood* agt. *Laytin*, *ante*, 63.)

2. And in an action by the receiver to recover, by virtue of said statute, from the stockholders, it is not necessary that the complaint should aver an intent, in making the distribution, to defraud the creditors. (*Id.*)

3. The receiver is a trustee for all the creditors, and the appropriate party to prosecute in their behalf; and all the stockholders who are liable may and should be included as defendants in the action. (*Id.*)

4. If any *creditors* have previously commenced actions individually, against such stockholders to recover such fraudulent distributions, they may be included as defendants together with the stockholders, in an action brought by the receiver, and restrained by injunction from the further prosecution of such action. (*Id.*)

5. Where *notes* are given for a premium on a *life policy of insurance*, which are accepted and received by the company, and are *receipted on the policy as so much cash*; in an action against the company by the widow of the husband who was insured for the benefit of his wife, the company is *estopped* from denying the payment of the premium in cash, where there is no evidence that the widow had any knowledge that her husband gave notes instead of cash. (*Baker* agt. *Union Life Insurance Co. ante*, 126.)

6. And this result is not changed by evidence produced on behalf of the company that one of the notes had not been paid at maturity by the husband, previous to his death; and the production of a printed memorandum, placed on the margin of the policy which says, that if any promissory notes given under said policy are not paid at maturity, the policy shall become void. (*Id.*)

7. The *receipt* of the company is a receipt for *cash*, to the wife who is benefited by the policy, and must be construed as a part of the agreement. (*Id.*)

8. Where the power of an *agent* of a *fire insurance company*, consists almost entirely—1st. Of authority to receive applications for insurance and make them binding upon the company for the period of ten days; and at the expiration of that time, if the company do not assume the risk, it terminates:

9. 2d. To receive the premiums or renewals of policies and transmit the same to the company and if accepted by them, on the receipt by him of the renewal certificate signed by the officers of the company, to deliver the same to the assured; such power does not authorize the agent to sign *consents*, on behalf of the company, to *assignments* of policies of insurance. (*Stringham* agt. *St. Nicholas Ins. Co.*, *ante*, 365.)

10. To bind the company to assignments of policies by an agent, his character as agent must be established and of so *general a nature* as to give him authority to do the act in question; or *subsequent ratification* by the company with full knowledge, must be established. (*Id.*)

11. The fact that the agent has entered in a book, called the policy register, which has been furnished him by the company, the consents to assignments of policies, without any knowledge on the part of the company of such entries, does not constitute a *general agency* which would authorize him to consent to such assignments. (*Id.*)

12. Where an application and survey is made, by the insured, to accompany a policy of insurance, or is referred to as forming a part of such policy, such application, survey and policy are to be construed together, as parts of one entire contract. (*Clinton* agt. *The Hope Insurance Company*, 51 *Barb.*, 647.)

13. Three separate surveys of property had been made, prior to the issuing of the policy in suit, and were on file in the office of the company's agent; the earliest bearing date in 1860, and the latest in 1863. All of these were signed by persons other than those insured under the policy in suit. All were made under circumstances wholly different from those existing when such policy was issued, in February, 1865, and the persons insured in such policy had no knowledge, when they took the same, of any of the prior applications or surveys, although they knew the property had been insured. The agent, if he had any knowledge of the former applications and surveys, also knew they were so defective add incorrect as to make

the policy sued on worthless to the insured. *Held*, that, under these circumstances, it was not to be presumed that either party entered into the contract of insurance in question in view of, or subject to, former surveys, the contents of which were either unknown to the parties, or were known to be fatal to the efficiency and validity of the policy insured. (*Id.*)

14. *Held, also*, that the insured were not identified with surveys previously filed by other parties, in such a manner as to estop them from denying that the representations in such surveys were theirs or that they were responsible therefor. (*Id.*)

15. Extrinsic evidence may always be adduced to ascertain the interests intended to be insured, and a survey may be had in accordance with such proofs. (*Id.*)

16. The expression, "Estate of Daniel Ross," in a policy, is indefinite, uncertain, and without any specific legal significance. But its signification may be shown by parol, or by any circumstances surrounding the case, and tending to elucidate the purpose of the parties. Parol evidence may be given to establish who were the parties really insured, and such parties may recover on the policy, though not the nominal parties thereto, or named therein. (*Id.*)

17. Thus, if the evidence shows, conclusively, that such insurance was effected for the benefit of the widow, heirs at law and next of kin of the person named, they, or their assignee, may recover upon the policy. (*Id.*)

18. Under an executory contract, by the widow of a deceased owner of real and personal property, and the guardian of his infant heirs, to sell such property to the plaintiff as soon as the necessary authority could be obtained from the court, for the special guardian of the infant heirs to convey, the plaintiff went into possession of the premises as tenant of the estate, at a specified rent. The property was insured by the defendant in the name of the deceased's "estate," and before any conveyance was made, the same was destroyed by fire. *Held*, that the contract was not one which could be specifically enforced by the plaintiff; nor did he acquire any legal or equitable title to the property, or become, in any sense, the owner of it. That he had no equities, no insurable interest, nothing at risk, and consequently, suffered no loss; but that the estate of the deceased, by such loss, acquired a right of action to recover the amount insured, up to the value of the property destroyed. (*Id.*)

19. *Held, also*, that a deed of the property, subsequently executed by the special guardian appointed for that purpose, was an exception to the rule, that, on judicial sales, the deed takes effect, by relation, from a time antecedent to the date; inasmuch, as by the contract between the parties, it was not to take effect, as a contract of sale, until the deed was executed and delivered, but was, up to that time, a lease of the property. And whatever the law may be, in the absence of a contract, parties may control its operation by their contract. (*Id.*)

20. When there is no valid contract for the sale of real estate, there can be no relation to one. (*Id.*)

21. Where property contracted to be sold, after being insured, was destroyed by fire before any delivery or conveyance, in consequence of which the vendors were unable to perform, and the purchaser was unwilling to perform, by taking what was left, and paying the price originally agreed upon, and a new contract was made, by which the purchaser took what was left of the property, and an assignment of the rights of action on the policy of insurance, in lieu of the real and personal property agreed to be sold; *Held*, that this was not the performance of the old, but the making and executing of a substituted contract; and that there could be no principle of subrogation applicable to the case, in the interest of the vendors. (*Id.*)

22. *Held, also*, that the purchaser, as assignee of the policy, was entitled to recover the amount of the policy, provided the value of all the property destroyed equaled or exceeded the amount insured therein. (*Id.*)

23. In construing a policy of insurance the written part is to prevail over that which is printed. (*Id.*)

24. To constitute an agreement, it is not necessary that a proposition made by one party to another by letter, should be accepted expressly. If it is acted upon, and complied with, that is a sufficient acceptance. (*Beardsley* agt. *Davis*, 52 *Barb.*, 159.)

25. Thus where the defendants, factors and produce and commission merchants addressed a letter to the plaintiffs, who were malsters, soliciting their business or a continuance of their business, stating their terms, and inviting consignments of malt, and the plaintiffs,

without replying to the letter, or expressly accepting the proposition made therein, made several shipments of malt to the defendants; *Held* that this was an acceptance of the terms proposed; and that it was not material that the plaintiffs had previously done business with the defendants without any knowledge of their terms. *(Id.)*

26. *Held, also*, that on receiving such letter from the defendants, stating that their charges for selling were five per cent., which covered all expenses, insurance, storage, &c., and a guaranty of the sales, the plaintiffs were at liberty to withdraw their business, or continue it, as they pleased; and that the making of further shipments by them, after that, was evidence that the terms were satisfactory, and that they were accepted. *(Id.)*

27. *Held, further*, that these facts justified a finding by the referee that there was an agreement between the parties that the defendants should cause the property of the plaintiffs to be *insured*. *(Id.)*

28. And that to enable the referee to determine whether such agreement had been broken, it was proper for him to receive evidence as to the meaning of the word "insurance," as used by the defendants in their letter; that is, whether it meant a full or partial insurance; or what the custom of factors was, as to the extent of the insurance, when they effected insurance. *(Id.)*

29. Where an agreement to insure is general, and there is no difficulty in procuring full insurance, and such is the general practice in the particular matter embraced in the contract, the fair and reasonable construction of the agreement is that the party undertakes to procure a contract for a full indemnity. *(Id.)*

30. In the absence of any evidence, aside from the general agreement *to insure*, the court, in fixing the *amount* of the insurance would not, *it seems*, stop short of a full insurance; unless it was shown that in the particular matter or business it is not the practice to fully insure. *(Id.)*

31. The contract of insurance is one of indemnity; and the party whose property is destroyed will not obtain an indemnity unless he receives the full value of his property. *(Id.)*

32. In an action against an agent, for negligence, in not procuring full insurance, the measure of damages is the value of the property destroyed; to be reduced by any amount received under a partial insurance. *(Id.)*

33. Factors, who had agreed to insure property consigned to them, effected insurance to the amount of forty-one per cent. only, and the property being destroyed by fire, they wrote to the consignors conceding their liability to account for all they had received from the insurers, and placed the amount to the credit of the consignors, regretting it was not more, and hoping it would prove satisfactory. The consignors replied: "We supposed you were nearly insured in full; but if this is all we are entitled to, we must submit." And they drew a draft upon the factors for the amount received by them on account of insurance, which was paid. *Held* that there being no dispute between the parties about the facts, or about the claim, this did not amount to an *accord and satisfaction*. *(Id.)*

34. Where an insurance company, undertaking to repair a building injured by a fire, under a reservation of the right to do so, in the policy, advanced money to the contractor, upon the certificate of a person employed by the insured to oversee the work, that the work, up to that time, had been satisfactorily done, leaving still enough unpaid, however, to indemnify the company against a claim of the insured for damages, on account of the defective execution of the work, which was also unpaid until after notice of such claim, and the last payment on the contract was not made by the insurers until they had received an indemnity from the contractor against the claim of the insured; *Held* that the advance did not injure the company, and it could not claim to have been damnified by the certificate, at least not in such a way to *estop* the insured from showing the truth, viz: that the repairs had not been made in a proper manner. *(Ryder agt. The Commonwealth Fire Insurance Co.*, 52 *Barb.*, 447.)

35. And that, assuming that the person giving the certificate was authorized to give the same, still the company would not have been prejudiced by allowing the truth to be proved. *(Id.)*

36. Where a foreign corporation, lawfully engaged in the business of life insurance in this state, created and maintained an agency in the city of New York, for that purpose, and organized a local board of directors there, with authority to issue policies, and adjust losses, without consultation with the corporation itself; *Held* that the that the local board and the agency, combined, did not form or constitute a corporation, but simply the local means

or agency through which the corporation transacted its business in this country; that no matter how formal or complicated such local organization might be, it could only possess and exercise the power conferred by the foreign charter, and the laws of the state, upon the corporation itself; and that when the local board and agency issued a policy, collected a premium, adjusted a loss, or appointed a subordinate agent, the act was not done for such board itself, but for the corporation. (*Robinson* agt. *International Life Assurance Society of London*, 52 *Barb.*, 450.)

37. *Held, also*, that such agency at New York appearing to have been of the most complete and general character, it had the power to appoint subordinate agencies, wherever, in its judgment, the business of the corporation required them to be located. That this could be done either in writing or by parol; and that when the appointment was made by writing and nothing limiting the action of the New York agency was contained in it, the power of the local agent could afterwards be enlarged by parol. (*Id.*)

38. And such agency at New York having appointed an agent for the corporation, at Richmond, Virginia, by a writing not conferring upon him authority to receive payment of premiums; that authority being derived from renewal receipts forwarded to him from the agency at New York from time to time; *Held* that there was nothing to prevent the New York agency from afterward authorizing the agent to receive the premiums accruing on policies, without being supplied with renewal receipts for that purpose. (*Id.*)

39. And it being claimed that the condition of the country during the rebellion, having rendered the transmission of renewal receipts impracticable, after 1861, it was to be presumed that authority was actually conferred upon the agent to act, without any such receipts; and the jury having found, upon conflicting evidence, that the authority was conferred, substantially as claimed; *Held* that the court had no power to interfere with their conclusion. (*Id.*)

40. And that if the authority was conferred, it amounted to a general authority to the local agent at Richmond to collect the premiums accruing to the company upon the policies it had previously issued, and to receive the same, without renewal receipts, and without specific directions as to what he should receive them in. (*Id.*)

41. That the agent was bound to exercise this authority according to the ordinary course of the business he was employed in, and the settled usages, if any were found to exist, relating to the subject, and that, although he could not bind his principals, or satisfy the powers of his agency, by accepting *property* for the premiums, yet that from the nature of the power to receive payment, the agent necessarily derived the power to accept *whatever was generally used* for the purpose of making payments in the locality where the debts were to be collected. (*Id.*)

42. And the actual currency of that locality being, soon after the agent was directed to collect the premiums without renewal receipts, supplanted by *Confederate notes*; which were thenceforth the financial means used there, for buying and selling property, and for creating and discharging debts; *Held* that the agent was authorized in his discretion, to receive such notes in payment of premiums; and that having so received them, in good faith, the payment was valid and binding, as between the assured and the insurers. MULLIN, J. dissented. (*Id.*)

43. *Held, also*, that this being the only possible mode, under the circumstances existing at the time, in which the premiums could be collected by the agent, and it having been made his duty to obtain their payment, he was necessarily authorized to receive it in that manner. (*Id.*)

44. That even if that authority was not necessarily incident to the power conferred upon him, still, as he was authorized to collect the premiums, his acceptance of confederate notes, for the amount of them, discharged the assured; as it could not have been expected nor intended that the identical currency received by him should be remitted to the general agency at New York while commercial intercourse between the two places was interrupted by the war. (*Id.*)

45. A contract of insurance, made between an English corporation and a citizen of Richmond, Virginia, previous to the war, being a contract between a neutral and a rebel recognized by the insurer's government as a belligerent, was not annulled or suspended by the war; and the insured is not prevented by anything rendering the insurance illegal, from maintaining an action upon the policy. (*Id.*)

46. It is the duty of assessors to estimate the contingent liability of an insur-

ance company upon outstanding policies of insurance in force, by the usual rules for determining such liability, and to deduct the assessment so found, in making their assessment of the company, for the purpose of taxation. (*The People* agt. *Ferguson*, 38 *N. Y.*, 89.)

47. The terms "hazardous," "extra hazardous," "specially hazardous" and "not hazardous," are well understood technical terms in the business of insurance, having distinct and separate meanings. Hence, a policy covering only goods "hazardous" and "not hazardous," cannot be made to cover goods or merchandise "extra hazardous" or "specially hazardous," and the keeping of turpentine, under such a policy, would be fatal to a recovery. (*Pinder* agt. *Continental Ins. Co.*, 38 *N. Y.*, 364.)

48. Corporations, in the absence of restrictions imposed by statute, have the power necessary to enable them to transact the business authorized by their charter. They may borrow money for the purposes of their business, and for the like purpose may procure sureties whose contracts of indemnity are valid, the same as if made with individuals. (*Hope Mutual Life Ins. Co.*, agt. *Perkins*, 38 *N. Y.*, 404.)

49. The plaintiff as a corporation incorporated by the legislature of Connecticut, had authority to take guaranty notes, for the security of policy holders; and such notes when given for such purpose are valid and binding contracts for the purposes specified. Same in case of *Hope Mutual Insurance Co.* agt. *Taylor et al.* (*Id.*)

50. The limitation in a policy of insurance, that the action shall be commenced "within the term of six months after any loss or damage shall accrue," is to be construed in connection with the other conditions of the policy; and thus construed, means that the action shall be thus commenced within six months after the right to sue the company has accrued. (*Mayor of N. Y.* agt. *Hamilton Fire Ins. Co.*, 39 *N. Y.*, 45.)

51. Thus, when the fire occurred on the 5th of October, and the proofs of loss were not adjusted by the parties until the 12th of the following February, *it was held*, that the limitation of six months did not commence to run, until the expiration of sixty days from the latter date. (*Id.*)

52. An objection to the authority of an agent, which was not made on the trial, cannot be raised on the argument, in this court. To obtain the benefit of it here, it is necessary that it should have been made on the trial, so specifically, that the party would have known what was the defect he was called upon to supply. (*Wolfe* agt. *Security Fire Ins. Co.*, 39 *N. Y.*, 94.)

53. The condition in a policy of fire insurance, avoiding the policy, in case of a sale of the property, does not apply to a stock of goods kept for sale. The goods may be sold and replaced as often as the interests of the owner require, the policy, meanwhile, covering whatever may be on hand. This rule applied where the assured sold the goods to S., who afterward sold them to the wife of the assured, and, subsequently, the assured, by the consent of the company, transferred the policy to his wife. The union of the property and the policy, in the wife, made the contract of insurance effectual. (*Id.*)

54. Under such circumstances, an insurance company is not allowed to raise the objection that an assignment from husband to wife, was void, on the ground of their incompetency to contract directly with each other. (*Id.*)

55. Where a policy of insurance against loss by fire in express terms declares the survey, or description of the premises referred to therein, to be "a part of the policy" and "warranties;" such description is to be so construed, and not to be regarded as a representation merely. (*Le Roy* agt. *Market Fire Ins. Co.*, 39 *N. Y.*, 90.)

56. A warranty if broken defeats the policy; the insurer may insist upon its exact truth, according to its tenor. (*Id.*)

57. In such case, it is error to submit to the jury the question, whether the particulars, in which, at the time of issuing the policy, the premises did not correspond with the description, increased the risk or not. In regard to mere representations, the rule is otherwise. (*Id.*)

58. A provision in a policy of fire insurance, exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy, as well as any external explosion. (*Hayward* agt. *Liverpool, &c., Ins. Co*, 5 *Abb., N. S.*, 142.)

59. The exception of fire caused by explosion is not inconsistent with the fact that the engine itself was insured against fire. (*Id.*)

60. The rule that, in case of repugnancy between the written and the printed parts of the policy, the written shall prevail over the printed part, is not applicable in such a case. In such case the enquiry always is, is there any repugnancy between the exception and the scope of the undertaking in the policy? If not, effect is to be given to both the written and printed parts according to the ordinary rules of construction. (*Id.*)

61. The loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury. (*Duncan* agt. *Gt. W., Ins. Co.*, 5 *Abb. N. S.*, 173.)

62. Those who had an interest in the vessel, at the time of such fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to the action. (*Id.*)

63. The mistake of naming one who has no interest, as the insured in a policy of fire insurance is cured by an indorsement, made by the secretary with notice of such mistake, stipulating that the loss, if any, is to be payable to a mortgagee named. (*Solms* agt. *Rutgers Fire Ins. Co.*, 5 *Abb., N. S.*, 201.)

64. A recovery may be had in the name of the real party in interest in such a case, for the indorsement may be regarded as a new contract of insurance with him. (*Id.*)

65. Whether the owner of property insured can recover, if the policy was, by mistake, made payable in terms to another person.—*query!* (*Id.*)

INTEREST.

1. Interest was allowed on the plaintiff's claim, as an attorney and counsellor at law, from the time when the last professional services were rendered, on the sum which the plaintiff's claim was then due. (*Graham* agt. *Chrystal*, *ante* 279.)

2. No objection to the *account* rendered by the attorney, having been made by the defendant until the commencement of the action, being over two years after such presentation, it was properly regarded as an account stated, and drew *interest from the time it was rendered.* (*Case* agt. *Hotchkiss*, *ante* 283.)

JOINT STOCK COMPANIES.

1. Although a *dissenting shareholder of a joint stock company* to consolidation with another company, like a retiring partner in an ordinary partnership, is not to be obliged, in the absence of express agreement to that effect, to surrender his interest in the property of his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale, in the only manner recognized by law for closing up partnerships in the absence of express stipulation: (*Mc Vicker* agt. *Ross*, *ante*, 474.)

2. Yet, where there is great disparity between the amount of stock assenting and that dissenting to the consolidation, with a just regard for the interests of all the parties concerned in the consolidated company, the court will order that the consolidated company, the defendants in the action, give *ample security* that the property transferred to the consolidated company, shall, if so required by the judgment of the court on the termination of the litigation, be delivered into the custody of the court, for the protection of all the parties interested. (*Id.*)

3. The plaintiffs, in such action, have no absolute right, though it is very common and usual to do so, to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver; their right, if they are entitled to have the property sold, is to have it sold when they have recovered judgment. (*Id.*)

JUDGMENT.

1. Under section 63 of the Code which provides that "a justice of the peace, on the demand of a party in whose favor he *shall have rendered a judgment*, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered," and directs that the time of the receipt of the transcript by the clerk shall be entered thereon, and entered in the docket, and "from that time the judgment shall be a judgment of the county court," there can be no judgment in the county court, unless a judgment has in fact been rendered in the justices' court. (*Stephens* agt. *Santee*, 51 *Barb.*, 532.)

2. If there has been no judgment rendered by the justice, the filing and docketing of the transcript in the county clerk's office is a mere nullity. The question is essentially jurisdictional. If it is not a judgment in the court in which the action was commenced and tried, it cannot, in the nature of things, be such in the county court. (*Id.*)

3. Although such transcript is *prima facie* evidence, not only that the judgment has been rendered by the justice, but that he had jurisdiction to render it, and when presented to the county clerk properly certified by the justice, is sufficient to authorize him to file it, and docket the judgment; and the judgment of the county court is sufficiently established, *prima facie*, by the production in evidence of a duly certified copy of the transcript, and docket; yet it may be shown that the transcript is entirely false, or a forgery, and that no such judgment was ever in fact rendered by the justice. (*Id.*)

4; Merely entering the verdict of the jury in his docket, by the justice, and putting down the items of costs and adding them up with the verdict, and thus ascertaining the sum total, without doing anything further, is not rendering a judgment on such verdict. Judgment must be rendered, and entered in some way as a judicial act. (*Id.*)

5. The statute provides that in all cases where a verdict shall be rendered, in a justices' court, "the justice shall forthwith render judgment, and enter the same in his docket." (2 *R. S.* 247, § 124.) The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment, in law. (*Id.*)

6. Where, although it appeared from the transcript furnished by the justice for the county clerk, that judgment was rendered by the justice, and entered in his docket, on the day the verdict was rendered, and in his certificate the justice stated that the transcript was "a correct transcript from his docket" of a judgment on record in his office, and of the whole of said judgment; yet it appearing from an examination of the justice's docket, on the trial, that there was no such entry therein as was stated in the transcript, and that none such had ever been made there; the justice testifying that he made the entries which appeared upon his docket, at the time the verdict was rendered, but was unable to state that he had made any entry of judgment, in his minutes, or anywhere; *Held*, that upon this evidence the referee was authorized to find, as matter of fact, that the justice never made any entry of judgment in any way, and never rendered judgment upon the verdict. (*Id.*)

7. A judgment, in a justice's court is not completed, so that it can be enforced by execution, until it is entered in the docket, even where it has first been entered in the minutes in date time. (*Id.*)

8. It is not competent to prove, by parol, the entry of a judgment, not upon the minutes of the justice, nor upon his docket. (*Id.*)

9. A judgment, in an action to foreclose the equity of redemption in mortgaged premises, directing the sale of the premises for the satisfaction of the debt, and that defendant pay any deficiency appearing after such sale, is final, and not interlocutory merely. It leaves nothing further to be adjudicated or reviewed by the court. (*Morris* agt. *Morange*, 38 *N. Y.*, 172.)

10. The decision in this case, and that of *Clark* v. *Brooks* (2 *Abb.* N. S. 385), compared. (*Id.*)

11. Where the court below give a plaintiff his election to remit a part of the sum recovered and take judgment of affirmance for the residue, or to submit to an order for a new trial, and, instead of remitting he allows the order granting a new trial to be made, and appeals therefrom to the court of appeals, giving the usual stipulation that if the order be affirmed, judgment absolute may be entered against him, this court cannot relieve him from his stipulation on affirming the order. In such case the defendant is entitled to final judgment, however clear it may be that the plaintiff was entitled to recover the amount for which he was in the court below permitted to have judgment. (*Hitchings* agt. *Van Brunt*, 38 *N. Y.*, 335.)

JURISDICTION.

1. The *City Judge* of New York has equal jurisdiction with the Recorder of summary proceedings to recover the possession of land. (*Marry* agt. *James*, *ante*, 52.)

2. Our courts have no power nor authority over *foreign governments* nor over their *property*; notwithstanding such property is within *our territorial limits*. (*Leavitt* agt. *Dabney*, *ante* 264.)

Digest.

3. Consequently, where funds of a foreign government are in the hands of its agents residing here, for the alleged purpose of being paid to creditors of that government who also reside here, the court here, being without jurisdiction over the principal—the foreign government, has no jurisdiction over its agents here. And being without jurisdiction over the parties, it cannot proceed *in rem* to dispose of its property in favor of resident creditors. (*Id.*)

6. The certificate of a county judge, given in pursuance of section 26, of the "Act to organize the State Lunatic Asylum." passed April 7, 1842, (*Laws of* 1842 *p.* 141,) as the same has been modified by subsequent statutes, is an adjudication *in rem* upon the subject to which it relates, and is, *it seems, prima facie* evidence of the existence of the facts asserted therein, as against all persons notified to attend the hearing and investigation before such judge. (*Board of Supervisors of Monroe County* agt. *Budlong*, 51 *Barb* 493.)

7. As the statute does not declare what shall be the force or effect of such certificate as evidence, or whom it shall bind, it must stand upon the same basis with all other judgments or adjudications. It must bind those who were parties and privies to the proceeding, and had an opportunity to litigate the question involved in such investigation and adjudication. No one else can be bound by it. (*Id.*)

9. If such certificate be *prima facie* evidence of the facts it recites, and affirms or finds, it is not conclusive on a party who has no notice of the proceeding. Such party is entitled to disprove the facts alleged or stated in the certificate upon which the jurisdiction of the judge depended. (*Id.*)

10. The jurisdiction of all courts and officers exercising judicial functions is open to investigation, question and inquiry, whenever their proceedings are set up or sought to be enforced; and if there is no jurisdiction, such proceedings are absolutely void. (*Id.*)

11. It is a fundamental rule of law, and of common justice, that no one shall be concluded by a legal judgment, decision or adjudication had or made in any suit or proceeding to or in which he was not a party or privy, and of which he had no notice; or in respect to which he had no opportunity to defend himself or to litigate the question involved; or upon which his liability depended. (*Id.*)

12. There is no power conferred upon the court, at special term, to review, alter, modify or change a judgment rendered at general term. (*Sheldon* agt. *Williams*, 52 *Barb.* 182.)

13. After the court, at general term, has, on a careful and deliberate review of a case, upon its merits, pronounced its judgment thereon, and made its award of costs, the rights of the parties are fixed, as to all the questions passed upon by the court, subject only to review by the court of appeals. In all other respects such judgment is final and conclusive. (*Id.*)

14. Whatever power a special term may have to control judgments, in matters of practice not affecting substantial rights —such as to allow their entry *nunc pro tunc*, &c.—they cannot exercise the power of review or modification upon the merits, of a general term decision. (*Id.*)

15. Where, on appeal to the general term of this court, by an administrator, from the decree of a surrogate made on his final accounting, the decree of the surrogate is affirmed, *with costs*, the court not directing the costs to be paid by the appellant personally, for mismanagement or bad faith, they are only payable out of the estate represented by him. (*Id.*)

16. Such a judgment cannot be so changed by an order made at specicial term. *ex parte*, as to direct that the respondents recover of the appellant a specified sum, "costs and disbursements of the appeal;" whether the effect of such direction be to make the appellant personally liable for such costs or not. (*Id.*)

17. The jurisdiction of the superior court of the city of New York, in actions for divorce, upon the ground of alleged adultery, was explicitly affirmed by this court in *Forrest* agt. *Forrest* (25 N. Y. 501.) (*Forrest* agt. *Havens*, 38 *N. Y.*, 469)

18. The court of the general sessions of the peace, in and for the city and county of New York, have authority to grant new trials upon the merits in cases tried before them. (*Lanergan* agt. *The People*, 39 *N. Y.*, 39.)

19. In an action in a state court to stay proceedings on a judgment, and to have it set aside, upon the ground of fraud, if one of the defendants be a consul, the temporary injunction must be dissolved as against him, because state courts have no jurisdiction of the person of such an officer. (*Sippils* agt. *Albites*, 5 *Abb. N. S.*, 76.)

20. The injunction may, however, be continued, in a proper case, as against other defendants. (*Id.*)

21. The fact that the character of a party is such as to deprive the court of jurisdiction of his person is equally with his non-residence, sufficient excuse for proceeding without him, in a cause of equitable jurisdiction. (*Id.*)

22. The court of general sessions of the city of New York has the power to grant new trials. The act of 1859 (*Laws of* 1859, *ch.* 339, § 4).—which grants to the "courts of sessions of the several counties" of the state the power to grant new trials,—is broad and comprehensive enough to include the court of general sessions of New York city. (*Lanergan* agt. *People*, 5 *Abb., N. S.*, 113.)

23. The office of a writ of certiorari, when issued out of the supreme court to review the proceedings and determination of inferior tribunals, extends to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the act complained of; and to all questions of regularity in the proceedings, that is, to all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the expressed terms of the statute, or by well settled principles of the common law. (*The People* agt. *Board of Assessors, &c.*, 39 *N. Y.*, 81.)

24. The judgment of the supreme court upon these questions of jurisdiction, &c, is reviewable in this court. (*Id.*)

JUSTICES' COURTS.

1. Prior to the constitution of 1846, *re plevin* was one of the causes of action of which a *justice of the peace had no jurisdiction.* (*Baxter* agt *Putney, ante*, 140.)

2. In 1860, under the Code, the legislature conferred such jurisdiction on justices of the peace in actions where the value of the property claimed did not exceed $100. (*Id.*)

3. *Juries* in courts of record, prior to the constitution of 1846, were composed of *twelve men*, and so have remained to the present time; and the word "jury," as used in art. 1, sec. 2, of the constitution, means a common law jury of twelve men. (*Id.*)

4. When, therefore, a plaintiff brings an action of replevin or for the possession of personal property, under the Code, in a justices' court, if the defendant demands a jury trial by *twelve men*, the justice must dismiss the action, as he has no jurisdiction to summon a jury of only six men. (*Id.*)

5. A reply being inadmissible in justice's court, the allegation of new matter, in the answer, must in all cases, be deemed controverted by the plaintiff, and it is competent for him to countervail it by evidence, either in direct denial or by way of avoidance; the plaintiff must state a cause of action, and that is all that is required. (*Conklin* agt *Field, ante*, 155.)

6. Under section 63 of the Code, which provides that "a justice of the peace, on the demand of a party in whose favor he *shall have rendered a judgment*, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered," and directs that the time of the receipt of the transcript by the clerk shall be entered thereon, and entered in the docket, and "from that time the judgment shall be a judgment of the county court," there can be no judgment in the county court, unless a judgment has in fact been rendered by the justice's court. (*Stepyens* agt. *Santee*, 51 *Barb.* 532.)

7. If there has been no judgment rendered by the justice, the filing and docketing of the transcript in the county clerk's office is a mere nullity. The question is essentially jurisdictional. If it is not a judgment in the court in which the action was commenced and tried, it cannot, in the nature of things, be such in the county court. (*Id.*)

8. Although such transcript is *prima facie* evidence, not only that the judgment has been rendered by the justice, but that he had jurisdiction to render it, and when presented to the county clerk properly certified by the justice, is sufficient to authorize him to file it, and docket the judgment; and the judgment of the county court is sufficiently established, *prima facie*, by the production in evidence of a duly certified copy of the transcript, and docket; yet it may be shown that the transcript is entirely false, or a forgery and that no such judgment was ever in fact rendered by the justice. (*Id.*)

9. Merely entering the verdict of the jury, in his docket, by the justice, and putting down the items of costs and adding them up with the verdict, and thus ascertaining the sum total, without doing any thing further, is not rendering the judgment on such verdict. Judgment must be rendered, and en

tered in some way as a judicial act. (*Id.*)

10. The statute provides that in all cases where a verdict shall be rendered, in a justice's court, "the justice shall forthwith render judgment, and enter the same in his docket." (2 *R. S.* 247, § 124.) The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment in law. (*Id.*)

11. Where, although it appeared from the transcript furnished by the justice for the county clerk, that judgment was rendered by the justice, and entered in his docket, on the day the verdict was rendered, and in his certificate the justice stated that the transcript was "a correct transcript from his docket," of a judgment on record in his office, and of the whole of said judgment; yet, it appearing from an examination of the justice's docket, on the trial, that there was no such entry therein as was stated in the transcript, and that none such had ever been made there; the justice testifying that he made the entries which appeared upon his docket at the time the verdict was rendered, but was unable to state that he had made any entry of judgment, in his minutes, or anywhere; *Held*, that upon this evidence the referee was authorized to find, as a matter of fact, that the justice never made any entry of judgment in any way, and never rendered judgment upon the verdict. (*Id.*)

12. A judgment, in a justice's court, is not completed, so that it can be enforced by execution, until it is entered in the docket, even where it has first been entered in the minutes in due time. (*Id.*)

13. It is not competent to prove, by parol, the entry of a judgment, not upon the minutes of the justice, nor upon his docket. (*Id.*)

14. Section 54 of the Code of Procedure takes from a justice of the peace jurisdiction of a case where the total amount of the accounts of both parties exceeds $400; and the fourth subdivision invests the justice with the power of adjudicating this question; and fixes the time *when* he may decide it, viz: "When the fact shall be proved to his satisfaction." This period cannot arrive until the trial has commenced, and the proof been entered upon. Until he decides that question, he has jurisdiction to act. (*Glackin* agt. *Zeller*, 52 *Barb.*, 147.)

15. If, at the close of the plaintiff's testimony, the defendant objects to the jurisdiction of the court, because it appears that the accounts of the parties exceed the sum of $400; whereupon the justice decides that the sum total of the accounts of both parties exceeds $400, and dismisses the cause, on the ground that he has no jurisdiction, the defendant is *estopped* from afterwards asserting to the contrary. (*Id.*)

16. It is a judicial finding, by the justice, upon a question of fact, and upon a question of which he had jurisdiction. If the evidence was conflicting, his decision would be conclusive; and it is equally conclusive, if not shown to be erroneous, when the facts upon which he decided are not made to appear. All presumptions are to be in favor of sustaining the adjudication. (*Id.*)

17. The question having been thus decided, by a court of competent jurisdiction, upon a point directly between the parties, such decision, so long as it remains unreversed, is conclusive in all subsequent controversies where the same point comes again in question between the same parties. (*Id.*)

18. Hence, if the plaintiff in such action on the dismissal of the same by the justice, commences an action in the supreme court for the same cause of action, and recovers a judgment, he will be entitled to costs, although the amount of the recovery is less than $50. The defendant cannot recover costs of *him* on the ground that the action should have been brought in a justices court. (*Id.*)

19. The rule is well established that a party who obtains the benefit of an order or judgment in a cause, and accepts the benefit, or receives the advantage, shall be precluded from afterwards asking that the order or judgment be reviewed, or from denying the authority which granted it. (*Id.*)

20. It is not necessary, to entitle a party suing in this court, and recovering less than $50, to costs, that he should have first brought an action in a justice's court. It is enough, if the facts as proved on the trial, in this court, show it to be a case in which, by section 54 of the Code, a justice has no jurisdiction. (*Id.*)

21. Where there are unliquidated accounts between the parties, the total amount of which, *contested on the trial*, exceeds $400, a recovery by the plaintiff of any amount entitles him to costs. (*Id.*)

22. Where a defendant sued by long

summons in a justice's court, in a different county from that in which he resides, appeared by attorney and put in an answer, the attorney stating that the defendant resided in another county, but he did not plead that fact, nor would he make an affidavit of it; *Held* that the defendant, by answering, waived any defense on the ground of residence, and thus gave the justice jurisdiction of his person. The case of *Clapp* agt. *Graves*, (26 *N. Y. R.*, 418,) is decisive in such a case. (*Osburne* agt. *Gilbert*, 52 *Barb.*, 158.)

23. In an action brought in justice's court, against a constable, for neglect of duty in returning an execution unsatisfied, when the same might have been collected, the minutes of the justice before whom the original action was tried, and the judgment rendered by him, are admissible in evidence, for the purpose of showing jurisdiction and that the action was for services performed by the plaintiff as a domestic; a judgment on such a demand being favored by the statute, (*Laws of* 1858, *ch.* 107,) modifying the exemption laws. (*Baker* agt. *Brintnall*, 52 *Barb.*, 188.)

24. Although the statute directs that every justice shall keep a book called a docket, and also directs what entries he shall make therein, the omission, by a justice, so to keep his book will not render his judgments void. Proceedings before him can still be proved by himself. (*Id.*)

25. For certain purposes, the docket fails to be evidence, if not kept as the statute directs, but the omission so to keep it is not jurisdictional. (*Id.*)

26. The omission by a justice to keep his docket in a manner which the law prescribes does not render a judgment given by him void; as the proceedings before him can still be proved by himself. (*Baker* agt. *Brintnall*, 5 *Abb. N. S.*, 253.)

LANDLORD AND TENANT.

1. Where a lease of a building and premises for a term of years, contains a mutual covenant on the part of the landlord and tenant, that in case the premises are so damaged by accidental fire, as to make them untenantable for more than thirty days, the rent shall cease at the option of the tenant until the premises shall be repaired, and no covenant on the part of the landlord to repair, nor any other express covenant on his part; on a partial destruction of the premises by fire, the landlord is not responsible to the tenant for damage to his property, by exposure to the elements, or otherwise, by not making immediate repairs after the fire. (*Doupe* agt. *Genrin*, *ante.* 5.)

2. A subsequent *parol promise* to repair, made by the landlord, is not good unless supported by a sufficient consideration. (*Id.*)

3. The tenant's remedy in such a case is under the covenant in the lease, to require an abatement of the rent until the premises are repaired. (*Id.*)

4. The lease of a dairy farm with a certain number of cows and other personal property for two years at a certain rent per annum, payable at a certain time made and executed by landlords to a tenant, which contained a clause as follows: "The party of the first part (landlords) are to have full title with the privilege of taking possession at any and at all times, of any and all products of the farm in payment of the balance due on the rent at the time of its payment:"

Held, that this clause operated in favor of the landlords and their assignee as a mere security for money, and was necessarily in the nature of a *chattel mortgage;* and the tenant being in possession of the farm and its products by an absolute lease, with the above exception, and the lease never having been filed as a chattel mortgage, the products of the farm were liable to execution and sale for the tenant's debts; no default having been made in the payment of rent. (*Johnson* agt. *Orofoot*, *ante*, 59.)

5. An instrument, made since 1787, by one person to another, conveying lands in fee, in this state, operates as an assignment and not as a lease; and hence the strict relation of landlord and tenant is not created thereby. (*Lyon* agt. *Chase*, 51 *Barb.*, 13.)

6. There is, therefore, no distinction between the covenants contained in such an instrument and other sealed instruments, so far as the presumption of payment or extinguishment is concerned. (*Id.*)

7. Where, in an action upon the covenant to pay rent, contained in such an instrument, executed in 1799, there was no evidence to show that any rent had ever been paid upon it, during a period of sixty-four years, and it appeared affirmatively not only that the defendant had not paid rent within twenty-two years, prior to the commencement of the action, but that the plaintiff had

not *claimed the same*; *Held* that upon these facts the law raised the presumption that the cause of action had been released, discharged or extinguished, and the plaintiff could not recover. (*Id.*)

8. The presumption of payment, in such a case, will not be repelled by an admission of the defendant that there had been a general resistence and refusal to pay rent, for the last twenty-five years, by the tenants of the manor of which the lands in question constituted a part. (*Id.*)

9. Where land is rented for a nursery, the tenant must remove the trees before he quits possession, on the termination of his lease, or the title will vest in the owner of the reversion. (*Brooks* agt. *Galster*, 51 *Barb.*, 196.)

10. A lease of a store contained a provision that if the lessor should sell the building he would pay to the lessees, out of the proceeds of the sale, $1200, and if the building should be taken down, at the expiration of the lease, the lessees should have the right to take from the premises certain fixtures, and for such other expense as they should have contributed toward building the store they should be paid out of the sale if made, "*a pro rata* share of the amount received for the building, in proportion as the amount advanced by the lessees," should "bear to the whole cost of the building:"

11. *Held*, that the lease provided for two events, either of which might happen, viz: taking down the building, or selling it. Which of the two was to be done rested entirely in the option of the lessor, and the lessees had no right to dictate, or to be consulted as to his determination. (*Butterworth* agt. *Bliss*, 52 *Barb.*, 430.)

12. That the parties intended, by the first provision, to fix a sum which should be an equivalent for the fixtures, which sum was fixed at $1200. If sold, the lessees were to be paid $1200; if not sold, they had the right to remove them. (*Id.*)

13. That the second provision contemplated compensation for any other expense except the shutters, &c. in case a sale was effected, but nothing if the building was taken down; and the lessees had no reservation of any materials used therefor. (*Id.*)

14. That the lessees had no right to complain that the building was sold at a price much less than its value, and that no notice of the intended sale was given them by the lessor; as they could not be injured by a sale at any price; but a sale would operate to their benefit in giving them a portion of the price, while they would get nothing if no sale was effected. (*Id.*)

15. That unless the sale was to be held valid, there was no sum of which the lessees were entitled to a *pro rata* portion. (*Id.*)

16. That there was no trust for the lessees' benefit; nor was the sale, in any event, to be made for their interest; but the only contract was to pay a portion of the sum received. (*Id.*)

17. That neither of the parties were entitled to interest on their advances, in ascertaining the proportions to belong to each. The allowance was to be in proportion as the amount advanced should bear to the whole cost of the building; not the amount advanced and interest. (*Id.*)

18. That a charge for a furnace, put in by the lessees long after the building was finished, was no part of the expense for building the store; and it might have been removed by them before leaving. (*Id.*)

19. The defendant's testator executed a lease to H. of certain premises for the term of twenty-one years from the 1st day of May, 1824, which contained a covenant on the part of the lessor for a new lease at the expiration of the term, for another period of twenty-one years. On the first day of March, 1844, a lease was executed and delivered to the plaintiff, as assignee of the original lessee, for a second term of twenty-one years, which contained a covenant that at the expiration of the said second term, the lessor would, at his election, either grant a new lease of the premises for a further term of twenty-one years, or that he would pay the party of the second part the value of "all such stone or brick buildings" as might have been "erected by the said party of the second part, his executors, administrators or assigns, on the said demised premises, and be then standing thereon." At the expiration of the second term, the defendant elected not to give a lease for a third term, and refused to pay for certain stone and and brick buildings on the premises, which had been erected by H. the original lessee:

20. *Held* that although the plain import of the clause in the second lease, respecting payment for the buildings, standing and considered by itself, was that the defendant would pay for such buildings only as the *plaintiff* erected;

yet that other provisions contained in such lease, as well as in the original lease to H. indicated that a different construction should be given to it. And that as the second lease was given for the purpose of continuing and extending the term created by the first, the latter should be considered, so far as applicable, in ascertaining the construction to be placed upon the clause in question. (*Wray* agt. *Rhinelander*, 52 *Barb.*, 553.)

21. And the defendant having given the plaintiff the second lease without attempting therein to divest him of the title to the buildings which he had under the assignment to him of the first lease; the same expressly declaring that the plaintiff should continue to be the owner of the buildings, and should remain such owner even though a third lease should not be given to him; and securing to him the privilege of taking them away, provided he did so within ten days after the expiration of the term created by the second lease; *Held*, that the buildings were not only the plaintiff's property, as the assignee of the first, and lessee of the second lease, but he was to remain owner of them, even though the defendant should conclude not to give the third lease. (*Id.*)

22. And that the second lease should be so construed as to render the defendant liable to pay for such buildings, upon his refusal to give a new lease. And that thus construed, it imposed on the defendant the obligation of giving the plaintiff a new lease, in default of an election on his part to pay for the buildings. (*Id.*)

23. In an action by lessees of a warehouse to recover the expense of caulking the floors to prevent leakage from one floor to another, under a lease wherein the lessor agreed to "do all necessary repairs upon said premises and pier, within a reasonable time after notice to him," by the lessees, the judge charged among other things, that, if the floors were tight, as originally constructed, and became leaky without fault of the lessees, it was the duty of the lessor, upon proper notice, to restore them to their former tightness, if the business for which the stores were let reasonably required the floors to be tight. The jury found for the plaintiff, which, under the charge, was equivalent to finding, that the defendant failed to keep the buildings up to their original condition. (*Ward* agt. *Kelsey*, 38 *N. Y.*, 80.)

24. Whether the judge might not properly have submitted to the jury, as a question of fact, the necessity of water-tight floors in such warehouses, and hence, the duty of the lessor to have so constructed them, *quere*. (*Id.*)

25. An action for rent is not barred by the failure of the lessor fully to perform his contract, where the lessees enter into possession, and occupy the premises. (*Kelsey* agt. *Ward*, 38 *N. Y.*, 83.)

26. The remedy of the lessees is by recouping from the rent such damages as they have sustained by failure of the lessor to fulfill his contract, or to bring a separate action for the recovery of such damages. (*Id.*)

27. In an action for rent, the offer in evidence by the defendant of a judgment in his favor, for damages sustained by the failure of the plaintiff to fulfill the terms of his contract as lessor of the premises, was properly rejected; while the evidence offered by the plaintiff of a judgment in his favor, in an action between the same parties, and for the rent of the same premises for a previous quarter, was properly admitted, and was conclusive of the whole question. (*Id.*)

LEVY.

1. The sheriff, with execution in his hands, went to the person having charge of the property, or who, with others, was in its apparent possession, and, in view and control of the goods, informed him that he levied on the goods, and indorsed a memorandum of the levy upon the execution.—*Held*, that this was sufficient as a levy, although the person in charge was the assignor, who disclaimed any interest in the goods, and no notice was given by the sheriff to the assignee. (*Elias* agt. *Farly*, 5 *Abb., N. S.*, 39.)

LIBEL AND SLANDER.

1. If words are spoken of a person charging him, in express terms, with the crime of perjury, they are actionable without proof of any extrinsic facts to show their meaning. Such words necessarily import that the person charged has sworn falsely upon a material point, in a judicial proceeding before a court or officer of competent jurisdiction. (*Kern* agt. *Towsley*, 51 *Barb.*, 385.)

2. So if the words uttered, although not

charging perjury in express terms, *necessarily* imply that offense. (*Id.*)

3. In like manner, if the words used to express the charge, are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed, the impression that the plaintiff has committed perjury, and that the defendant intended to be so understood by those who heard him, such words will, of themselves, warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood. (*Id.*)

4. The defendant on being reminded by the plaintiff of a law suit which he, (the defendant,) had recently lost, said, "Yes your false swearing at that trial." Being told that he had not better accuse the plaintiff, again, of swearing false, he said: "Any man who professed to be a christian, as you do, and went into the box and swore false as you did, at the trial, had better join the church once more," &c. The charge of swearing false, in the suit, was repeated five or six times. The defendant also said that "The folks who belonged to the church and built tall steeples thought they could swear false, or do anything they had a mind to." *Held*, that the slander admitted that a suit was pending, and it was to be intended that what the plaintiff swore to was material; and that the words were sufficient to warrant a finding in favor of the plaintiff, without proof that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely with a corrupt intent. (*Id.*)

5. In an action for slanderous words, imputing to the plaintiff the crime of perjury, the defendant alleged in his answer, and offered to prove on the trial, that in a certain action theretofore pending before a justice of the peace, the plaintiff was sworn as a witness, and gave testimony material to the issue, which was untrue; and that whatever the defendant said of the plaintiff, had exclusive reference to such testimony: *Held*, that the matter thus pleaded and offered to be proved, was clearly insufficient as a justification, because it did not contain an averment that the plaintiff knew the testimony given by him to be false, or that he testified corruptly. The averment in the answer might be true, and yet the plaintiff be innocent of the crime of perjury:

6. *Held, also*, that the offer was equally insufficient for the purpose of mitigating damages; mitigating circumstances being those which tend to disprove malice. And although the circumstances set out in the answer might have had a tendency to induce in the mind of the defendant a belief that the plaintiff had committed perjury, yet that fact not being alleged in the answer, the testimony was properly excluded, when offered in mitigation. (*Gorton* agt. *Keeler*, 51 *Barb.*, 475.)

7. In pleading circumstances, which are claimed to be proper in mitigation of damages, for the reason that they induced the defendant to believe that the charge made by him was true, the fact of such belief, and that it was so induced, is an essential one, and should be distinctly alleged. (*Id.*)

8. But such an averment would be improper in an answer setting up a justification. Such an answer necessarily insists upon the truth of the charge, and it must allege facts showing that the plaintiff is guilty of the offense or disreputable conduct imputed to him. *Per* J. C. SMITH, J. (*Id.*)

9. An answer in mitigation impliedly admits that the charge was unfounded, but denies that it was made maliciously; and when such answer undertakes to set up that the charge was made in a belief of its truth, it must allege, not only circumstances tending to produce such belief, but also the fact that such belief, so produced, existed in the mind of the defendant when he made the charge. *Per* J. C. SMITH, J. (*Id.*)

MANDAMUS.

1. It is a well settled rule in this state, that an application for a *mandamus*, rests in the sound discretion of the court, which will grant or refuse it according as the issuing or withholding it will best promote the ends of justice. And this is so, notwithstanding it may appear that the party applying is otherwise remediless. (*Matter of McClelland* agt. *Dowling*, *ante*, 394.)

2. On an application by the *relator*, an *attorney at law*, for a *mandamus* to compel the defendants, justices of the court of special sessions, in the city of New York, to allow the *relator* to practice in that court, from which he alleged they had debarred him:

Held. 1st. That a refusal to listen to the *relator* in a single case, cannot alone be regarded as debarring him from practice in that court, and therefore would not justify it. (*Id.*)

3. 2nd. That the only act of the justices shown, related to but one case. *which was ended* before this proceeding was initiated, and therefore his general rights not being affected, there was *nothing pending* in which the *relator* had any interest, which could give him a standing in court to ask for a mandamus. (*Id.*)

4. And 3d. That this court should hesitate long, before attempting to control, by mandamus, the action of magistrates who, even if it be conceded that they have exceeded the strict limit of their authority, are acting for the highest interests of the profession and the public, and deserve the greatest commendation and support. (*Id.*)

MALICIOUS PROSECUTION.

1. The *evidence* upon which a charge of malice in procuring an arrest; the *circumstances* attending the arrest, and the *annoyances* to which the plaintiff was subjected in making the arrest, cannot be *pleaded* in an action for damages for an alleged malicious arrest. (*Solis* agt. *Manning*, *ante*, 13.)

2. In an action for assault and false imprisonment, an *answer* of the defendant, after denying all the facts set forth in the complaint, alleges, as a distinct defense "by way of justification and mitigation, that whatsoever acts he committed in relation to the plaintiff, at the times and places specified in the complaint, were done without malice and in due discharge of his office, as deputy sheriff, and not otherwise," is impertinent and irrelevant, and constitutes no defense whatever. (*Moore* agt. *Devoy*, *ante*, 18.)

3. *Advice of counsel*, given upon a full and fair statement of the case, and acted upon in good faith, is no doubt a good defense to an action for *malicious prosecution*. (*Ames* agt. *Stearns*, *ante*, 289.)

4. But where the statement on which such advice is given, corresponds in all respects with the facts contained in the affidavit upon which the plaintiff was arrested; which affidavit states that the plaintiff *falsely and fraudulently* represented to the defendants that &c. And on the trial, the jury find that there was no probable cause for the accusation of fraud, there is no ground for saying that the statement to counsel was fairly made or that it was in good faith acted upon. (*Id.*)

MANUFACTURING CORPORATION

1. Officers of a corporation are *special* and not *general* agents; consequently they have no power to bind the corporation, except within the limits prescribed by the charter and by-laws. (*Adriance* agt. *Roome*, 52 *Barb.*, 399.)

2. B. was the superintendent of a manufacturing corporation, but there was no evidence that he was its general agent, his actual authority being "to have charge of the manufacturing department of the works, audit bills for materials and labor, and to appoint and discharge foremen and workmen," and there was no proof that the corporation ever conferred upon him, or knew that he exercised any other authority; but on the contrary there was evidence that he was forbidden, generally, to sell iron belonging to the company: *Held*, that he had no authority to make a loan of money in the name of the company and execute a contract in its name, agreeing to sell and deliver to the lender a specific quantity of iron, in consideration thereof. (*Id.*)

3. Persons dealing with the officers of a corporation are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws. (*Id.*)

4. There is no grant of power in the name by which the officer is designated; especially when the authority given is specified in the by-laws. (*Id.*)

MARRIED WOMEN.

1. A *post-nuptial* contract between *husband and wife*, by which property is set apart for her separate use, although void at law, will be sustained in equity, where there are no creditors of the husband to be affected. (*Jaycox* agt. *Caldwell*. *ante*, 240.)

2. Where, at the time of the marriage of husband and wife in 1841, the wife had money of her own, and in 1842, let her husband have $665, to use in his business:

3. *Held*, that as the law then was, the husband became legally entitled to the money in question as his own, and the possession which he acquired of it was with her assent. (*Id.*)

4. But upon the facts found in this case, the husband, as far as he could, *waived his marital rights*, and received the fund named, not as his own, but as the

equitable trustee of his wife, (which he could assume voluntarily,) and by that means obtained the possession of it, which for aught that appeared, he could not otherwise have done. (*Id.*)

5. The agreement between the husband and wife, though not binding at law, was valid in equity, and sufficient as between them and all others, not then creditors of the husband. (*Id.*)

6 Consequently, an *assignment for the benefit of creditors*, made by the husband in 1867, to pay creditors, which had become such in 1866, providing for the payment to the wife of the assignor the sum so received by him from his wife in 1842, was valid, and the claim a proper one to be paid out of the property of the husband. (*Id.*)

7. Married women being permitted by the act of 1849, (ch. 375,) to make wills devising real and personal estate, the same statute which protects the after-born children of their husbands from wills made by such husbands, also protects the children of married women from wills made by their mothers previous to the birth of such children. (*Plummer* agt. *Murray*, 51 *Barb.*, 201.)

8. Hence children born after the making of a will, and not provided for and not mentioned therein, are to succeed as in case of the intestacy of the parent making such will, whether father or mother. (*Id.*)

9. Accordingly, where a married woman, in 1861, being then childless, made a will devising real and personal estate to her husband, and afterwards had a child born, who survived her; *it was held*, that such child, after her mother's death, was entitled to surplus moneys arising from the sale under a foreclosure, of the real estate devised, subject to the husband's life estate as tenant by the curtesy. (*Id.*)

10. The provisions of the Revised Statutes declaring that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," is not repealed by implication by the acts of 1848, 1849 and 1860, for the more effectual protection of the property of married women, but is still in force. (*Loomis* agt. *Loomis*, 51 *Barb.*, 257.)

11. Where a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it—particularly when he assumes to act and speak in her presence, for her—that he speaks and acts as the law and her duty require her to speak and act if she spoke herself. She must, in such case, dissent and disapprove his acts and declarations, or they should be deemed hers. (*Lindner* agt. *Sahler*, 51 *Barb.*, 322.)

12. She cannot stand by and hear him assert rights for her, and in her behalf, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. Under such circumstances, if she does not dissent, she will be deemed to assent. (*Id.*)

13. Thus, where the plaintiff, having lost certain sheep, went to the defendant's house, and demanded them of her husband, she being present, at the time, with which demand the defendant's husband refused to comply; *Held* that it was a question for the jury whether the defendant's husband refused to deliver the sheep on such demand, by her authority, direction or assent; whether he spoke for his wife, and she knew that he assumed to do so, and assented to what he said, or to his assumption to act and speak for her. And that if she did, the jury might infer a refusal by her; and in that case an action would lie, against her, for a conversion. (*Id.*)

14. A promissory note, given by a married woman as surety for her husband, and for his liability on a bond given by him as deputy sheriff, to his principal, and for defalcations on account of moneys collected for such deputy, is not binding upon her at law, notwithstanding it is expressed in the note, "and she hereby charges her separate estate with the payment of this note," Nor is there any liability in equity arising upon such a consideration. (*Kelso* agt. *Tabor*, 52 *Barb.*, 125.)

15. It is only in relation to the control and management of such property as a married woman may acquire under the provisions of the statutes of 1848 and 1849 that her incapacity to make contracts has been removed by those acts. In all other respects, her incapacity by reason of the marriage relation remains unchanged as it was at common law, before those statutes were enacted. (*Id.*)

16. The powers conferred upon married women, by those statutes, were in derogation of the common law, and are, therefore, to be strictly construed. (*Id.*)

17. Those statutes are not to be made, by construction, to extend to any object or purpose beyond that expressed, to wit, that of managing the estates so to be received by the persons intended to be benefited. (*Id.*)

18. The note of a married woman, which

would be otherwise void as a contract, is not validated and made binding by the insertion, in it, of a direction or charge that the indebtedness therein created may be charged upon her separate estate. (*Id.*)

19. Since the acts of the legislature of 1860, chapter 90, and of 1862, chapter 172, a married woman may bring an action, in her own name, against a wrong doer, for a wrong committed on her person, without joining her husband with her as a party. (*Ball* agt. *Bullard*, 52 *Barb.*, 141.)

20. To the damages which are recoverable for a personal injury to the wife, committed previous to the statute of 1860, the husband has no vested or other interest or right, legal or natural. Hence there is no ground for making him a party to an action therefor. (*Id.*)

21. As to the right to bring such an action, the statute of 1860 makes a married woman *feme sole*. By suing as a *feme sole*, she accepts its provisions, and takes it subject to its letter, its spirit and intent, limitations and liabilities. (*Id.*)

22. And treating her as a *feme sole*, with the disability to one, by reason of marriage, removed, the statute of limitations applies to the case, and if the action is not brought within one year, nor within six years after the removal of her disability to sue, by the act of 1860, it will be barred. (*Id.*)

23. The estate of tenancy by the curtesy is not abolished, as to subsequently acquired property of a married women, by the acts of the legislature of 1848 and 1849 "for the more effectual protection of the property of married women." (*Burke* agt. *Valentine* 51 *Barb.*, 412.)

24. Those statutes have not interfered with, or taken away, the right of the husband to the personal estate, or the estate by curtesy in the real property of the wife, after her death, if not disposed of by her during her life, or by will to take effect at her death. (*Id.*)

25. It was not the object of the act of 1848, to enable a married women to take property by gift, grant or devise, as she could do that before the act was passed. Its purpose was to enable the wife to take and hold property as a *feme sole*, not subject to the disposal of the husband, nor liable for his debts. It enables her to take such separate estate from any person other than her husband. (*Wilbur* agt. *Fradenburgh*, 52 *Barb.*, 474.)

26. The act does not create any new disability. It was always competent for a husband not at the time indebted, to make an advancement and provision for his wife. She could not take by grant directly from him, but a conveyance could be made to a trustee for her benefit, and if made in good faith and without intent to defraud creditors, it would be upheld against subsequent creditors of the husband. (*Id.*)

27. The act of 1848, has not changed the law, in this respect. A solvent husband, acting in good faith and without design to defraud his creditors, may still convey property to a trustee, for the benefit of his wife. (*Id.*)

28. Before the act, it was necessary that the trustee should continue to hold the title, as it could not vest in the wife without subjecting the property to the control of the husband, and rendering it liable for his debts. Now, however, as a married woman may hold property as a *feme sole*, the trustee can safely convey to her the legal title to the land of which she is the equitable owner. (*Id.*)

29. The validity of a deed made by a husband, as a provision or advancement for his wife, to a trustee, since the act of 1848, depends upon the same circumstances of good faith and solvency which would be considered in testing the validity of such an advancement made before that act took effect. (*Id.*)

30. Such a conveyance cannot be impeached by a subsequent creditor of the grantor, unless it appears that it was made with a fraudulent intent. (*Id.*)

31. Where a husband possessing a considerable amount of personal property, enjoying a fair credit, and indebted at the time, only to an inconsiderable amount, the greater part of which was afterwards paid, conveyed property to another, and the latter immediately conveyed the same to the wife of the former, as a provision or advancement, for her; and the wife erected a dwelling house thereon, with moneys which had been given to her, by her husband, for that purpose, in small sums, from time to time, during a period of several years before the transfer was made; *Held*, that these circumstances repelled any presumption of fraud arising from the husband's indebtedness at the time of the transfer: (*Id.*)

32. *Held, also*, that whether the husband's indebtedness was sufficient in amount to afford reasonable evidence of a fraudulent intent in the transfer, could

only be determined by comparing it with the amount of his property; and that in the absence of any proof upon that subject, there was nothing to impeach the transfer; and it must be deemed to have been made in good faith and without intent to defraud creditors. (*Id.*)

33. And the husband having, after the conveyance of the property to his wife was made, paid a sum due upon a mortgage which was a lien thereon when he purchased, and which he assumed to pay, as part of the purchase money; *Held*, that such payment could not be considered as voluntary, or in fraud of creditors, he being liable to make it. (*Id.*)

34 The circumstance that an assignee for the benefit of creditors constitutes the assignor his agent to transact the business, is not, alone, sufficient to show that the assignment was made with fraudulent intent. (*Id.*)

35. A person about to engage in a new business may not, with a view thereto, and for the purpose of securing his property for the benefit of himself and his family, in the event of losses occurring in such new business, convey such property to his wife, voluntarily, without consideration. Such a conveyance is fraudulent and void as to subsequent creditors. (*Case* agt. *Phelps*, 39 *N. Y.*, 164.)

36. It must be so declared, notwithstanding it be distinctly found, that the conveyance was made without any intent to defraud creditors *then existing*. (*Id.*)

37. The statutes of 1860 and 1862 do not enable a married woman to acquire title to property by gift from her husband. The statutes of 1848 and 1849 expressly disclaim this mode of creating a sole and separate estate in the wife. And the statutes of 1860 and 1862, do not enlarge the means by which such estate may be created, but declare the qualities of such estate when acquired in accordance with existing laws. (*Little* agt. *Willetts*, *ante*, 481.)

38. No gift *inter vivos*, confers title, unless the change of possession be positive, and the donor in no position to repossess himself of the subject matter of the gift, or to recall the same. (*Id.*)

MASTER AND SERVANT.

1. While the master is responsible, civilly, for the fraud, negligence, or other wrongful act, of his servant, committed in the transaction of his business he is not responsible for the willful injury committed by the servant while so engaged, unless he so act by the express or implied authority of his employer. (*Mali* agt. *Lord*, 39 *N. Y.*, 381.)

2. Where the superintendent and clerks called a policeman into the store of their employer, and directed him to arrest and examine the person of a lady suspected of stealing goods which was done without the knowledge or the express or implied authority of the owner of the goods, *held*, that the master was not liable. (*Id.*)

3. The servant is not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. (*Id.*)

4. Where a master does his best to supply skillful and competent persons to perform the service required, he is not liable for damages to an employee, resulting from the negligence of a co-employee engaged in the same general employment. (*Warner* agt. *Erie R.R. Co.*, 39 *N. Y.*, 468.)

5. A railroad corporation, having employed skillful and competent persons to supervise and inspect its road-bed and bridges, and having made it their duty to do so, is not liable for an injury to an employee, occasioned by the falling of one of its bridges, where the defect was such as was not apparent, and of which it had no notice. (*Id.*)

6. The only ground of liability of the master to an employee, for injuries resulting from the carelessness of a co-employee, which the law recognizes, is that which arises from personal negligence, or from want of proper care and prudence, in the management of his affairs, or in the selection of its agents or appliances, &c., (*Id.*)

MECHANIC'S LIEN.

1. Under an execution upon a judgment against a *municipal corporation*, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment. (*Following the case of Darlington* agt. *Mayor, &c., N. Y.*, 31 *N. Y.*, 164; *S. C.* 28 *How.*, 352) (*Brinckerhoff* agt. *Board of Education &c., ante.* 499.)

2. But if there is no such property, the remedy is by *mandamus* to compel the payment of the judgment out of any money or fund under the corporate con-

trol, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor is placed in the same condition as are the creditors of the state or of the United States. (*Id.*)

3. This rule applies to judgments under the *mechanic's lien law*. Therefore, under that statute a lien cannot be acquired for work done or materials furnished towards the erection of a *public school-house*, erected in accordance with the provisions of certain laws of the state relating to the city of New York, and which is devoted by these laws to a public use. (*Id.*)

4. And no such security can be obtained under the mechanics lien law, upon property, which, for reasons of public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions. (*Id.*)

MORTGAGE FORECLOSURE.

1. The plaintiff, being the assignee of a mortgage made by P. employed S. an attorney, to foreclose the same by advertisement, who caused a notice of the sale to be published, appointed the 8th day of September, 1866, for the day of sale. The defendant, desiring to bid upon the property, but having doubts about the legality of the proceedings, requested S. to adjourn the sale one week. S. consented to this, provided the defendant would give him $100 for a claim he had against the mortgagor's wife, to which the defendant assented, and the sale was adjourned. S. becoming satisfied his proceedings were not legal, commenced new proceedings, and appointed December 10, 1866, as the day of sale: on which day the plaintiff directed S. to adjourn the sale for two weeks, and countermanded instructions previously given to a third person to attend the sale, and bid off the premises. S. disregarded the direction given him, and sold the property, on the day appointed, to the defendant, he being the highest bidder, for $2100, subject to a prior incumbrance of $571; the property being worth $4000. The defendant had no knowledge, at the time of the sale, of any instructions to S. to adjourn the same. There was no agreement between S. and the defendant to share any profits arising from a resale and the $100 had never been paid by the latter to the former. S. was irresponsible.

2. *Held*, that if there was any fraud in the matter, for which the defendant was liable, it was in procuring S. not to sell the premises on the day originally appointed; and that the agreement for the payment of the $100, made in September, and the neglect to sell then, had no connection with, or relation to, the sale made in December, upon a new notice. (*Lent* agt. *McMaster*, 51 *Barb.*, 236.)

3. That assuming that there was no fraud in the case, on the part of the defendant, he having paid for the property more than two thirds of its value, as found by the referee, and nearly the full value, as estimated by some of the witnesses, the hardship was not so severe on the plaintiff, that the court would grant relief, allowing the sale to stand as security for the money paid by the defendant. (*Id.*)

4. That the case was not within the principle laid down in *Boyd* v. *Dunlap*, (1 *John. ch.* 478,) that where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but suspicious circumstances as to the adequacy of the consideration, and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid. (*Id.*)

5. That S. being authorized to make the sale, employed for that purpose, and acting within the scope of his authority, and the defendant purchasing the premises without knowledge of any private instructions to such agent, his rights were not affected by the fact that such agent made the sale contrary to, and in disregard of, the instructions of his principal. (*Id.*)

6. That it was not a case coming within the authorities relating to client and attorney, in which the court will at the instance of the client, relieve him from some improper act of the attorney; it not being a case in court, or a judicial proceeding, but a sale under the power in the mortgage, by S. the agent, or attorney in fact, employed to make the same. (*Id.*)

7. That had S. refused to pay over the money received on the sale of the premises, the court would have entertained summary proceedings against him, to enforce the payment of the money; the employment to foreclose a mortgage by advertisement, being regarded as so connected with his professional character as to afford the presumption that such character formed

the ground of his employment But when another person is to be affected, other principles of law, as to him, are to be consulted. (*Id.*)

8. A notice of sale, on a statutory foreclosure, need not specify that the mortgage will be foreclosed. *(Id.)*

9. In an action to foreclose a mortgage executed by individuals as "trustees" of a religious corporation named, extrinsic proof of facts to show whether the mortgage was the act of the corporation, or the individual act of the persons signing it, is admissible. (*Lee* agt. *Methodist Episcopal Church of Fort Edward*, 52 *Barb.*, 116.)

10. If it was intended by the parties and especially by the corporation, to be its mortgage, and there is some evidence upon the face of the papers, of such intent, it is erroneous to exclude all explanation, and all extrinsic evidence to show that it was the object and intent of the parties to make it the obligation of such corporation, and not the individual obligation of the persons signing it. *(Id.)*

11. It is only in cases where the language admits of no doubt, and is without ambiguity, that evidence in explanation is excluded. (*Id.*)

12. Where a bond and mortgage contained a recital that the persons executing them were "trustees" of a corporation named, and a promise to pay, by them and *their successors in office*; *Held* that this was a clear implication of language that the obligation was, and was intended to be, that of the corporation. (*Id.*)

13. *Held*, *also*, that the presumption arising from these facts was strengthened by resorting to the acknowledgement of the mortgage in which each of the persons executing the instrument stated that he was a trustee of the corporation; that he signed his name as trustee and affixed a seal thereto, by and under the order and resolution of the board of trustees; and the instrument was executed by him, as such trustee, for the purposes therein mentioned. (*Id.*)

14. A purchaser at a foreclosure sale is not entitled to the rents of the mortgaged premises which accrue between the sale and delivery of the deed, where such purchaser does not complete his purchase at the time designated in the terms of sale. *(Mitchell* agt. *Bartlett*, 52 *Barb.*, 319.)

15. Thus, where the purchaser refused to complete his purchase, and the premises were resold, and the second purchaser also refused, and the premises were resold a third time and were bought by a person acting for the original purchaser, when the sale was completed by the latter under his first purchase; *Held*, that he was not entitled to the intermediate rents. (*Id.*)

16. In such a case the deed does not relate back to the day of sale, so as to entitle the purchaser to the rents accruing between the sale and the giving of the deed, where he has by his own act, and in violation of his contract, delayed the completion of the purchase. (*Id.*)

17. By a sale of mortgaged premises under a judgment of foreclosure, the estates of the owner of the equity of redemption and of his lessee for years are absolutely barred and extinguished. The lessor's title being cut off by the foreclosure, the lease executed by him becomes void; and the estate of the lessee does not survive the contract by which it was created. If there is a surplus arising from the sale, the tenant is not entitled to any part of it. (*Burt* agt. *Stenton*, 52 *Barb.*, 377)

MOTIONS.

1. An interlocutory motion may, upon application to the court, be opened and heard anew, if the court in its discretion, thinks sufficient reason exists therefor. And if it be found to be required by law and justice, the court has power to vacate the order previously entered, and declare that a party is not entitled to the relief obtained thereby, and deny the motion for that relief. (*Belmont* agt. *Erie Railway Company*, 52 *Barb.*, 637.)

2. It is well settled that whatever can be done upon motion to the court may, by the court, upon further motion by either party, be altered, modified or wholly undone. (*Id.*)

3. Whether it be the party whose motion was denied, or the party moved against who asks the favor, if proper cause exists, the practice is the same. In either case the order previously entered is "*opened*," or vacated, and the matter heard anew, precisely as if it had never been argued before, and as if the principal or original motion, on all the papers then presented, had then, for the first time, been made. (*Id.*)

4. The decision of the court upon a motion, is not *res adjudicata*. (*Id.*)

5. But in order that mere litigiousness should not be encouraged or permitted,

the practice of the courts has been established to be that after a motion has been once fully heard and decided, it shall not be revived again, except upon leave of the court first had and obtained, or unless a different state of facts has arisen since the first determination. (*Id.*)

6. When a different state of facts has arisen since the first motion, a new motion, based upon these facts, may be made, as a matter of right. But when that is not the ground, leave must be obtained, from the court, which may grant it either upon additional facts and papers, or upon the same papers originally before the court. (*Id.*)

7. It is no objection to an application to open a previous motion, that it is made before a different judge from the one before whom the original order was made. Both orders are properly the acts of the same court—the special term—and not of the judges. (*Id.*)

8. Nor will the fact that an appeal from the order granted on the former motion has been taken, prevent an application to open such motion from being entertained. (*Id.*)

9. Where a party, upon such an application, shows material facts which were not presented to the court upon the previous motion, and that he was, so far as such matters then existed, prevented from bringing them to the notice of the judge by mistake, inadvertance, surprise, or excusable neglect, this presents such a case as will justify the granting of a motion to open the rule taken against him. (*Id.*)

10. A party to an action cannot be compelled by the adverse party to make an affidavit for the purpose of a motion, under subdivision 7 of section 401 of the Code of Procedure, as amended in 1862. (*The case of Fisk agt. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb., Pr. N. S.*, 430,—*disapproved on this point.*) (*Hodgkin* agt. *Atlantic & Pacific R. R. Co.*, 5 *Abb. N. S.*, 73.)

MUNICIPAL CORPORATIONS.

1. Under an execution upon a judgment against a *municipal corporation*, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment. (*Following the case of Darlington*, agt. *Mayor, &c., N. Y.*, 31 *N. Y.*, 164; *S. C.* 28 *How.*, 352.) (*Brinckerhoff* agt. *Board of Education, &c., ante* 499.)

2. But if there is no such property, the remedy is by *mandamus* to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor is placed in the same condition as are the creditors of the state or of the United States. (*Id.*)

3. This rule applies to judgments under the *mechanic's lien law*. Therefore, under that statute a lien cannot be acquired for work done on materials furnished towards the erection of a *public school-house*, erected in accordance with the provisions of certain laws of the state relating to the city of New York, and which is devoted by these laws to a public use. (*Id.*)

4. And no such security can be obtained under the mechanics lien law, upon property, which, for reasons of public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions. (*Id.*)

NEGLIGENCE.

1. The owners of a steamboat employed in the business of towing boats, for hire, are not common carriers, and hence not insurers. But they are liable if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the boats towed. (*Wooden* agt. *Austin*, 51 *Barb.*, 9.)

2. A provision in a contract for towing that the boats shall be towed "at the risk of the master and owner" of such boat, refers to the perils of navigation, simply, and cannot properly be construed to excuse the negligence of the proprietors of the towing vessel, or those in charge thereof. (*Id.*)

3. Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute. (*Id.*)

4. The defendant agreed to tow the plaintiff's boat from Albany to New York. After proceeding about four miles, the defendants' hawser broke, and set the plaintiff's boat, with others, adrift, which floated down the river some fourteen miles, without any attempt to regain it. There was no explanation offered in respect to the strength of the hawser; or the immediate cause of its breaking; or in regard to the management of the steamer; or why an

effort was not made to again take the plaintiff's boat in tow, although there was evidence to the effect that there was no difficulty in the steamer taking the entire tow through to New York. In an action against the defendants for damages occasioned by their negligence; *Held* that the plaintiff was improperly non-suited. (*Id.*)

5. The question of negligence is peculiarly a question of fact to be determined by the jury; and the case must be very clear which will justify the court in withholding it from their consideration. (*Id.*)

6. The defendants' bank having on the first day of July, 1863, paid out to the plaintiff's agent a counterfeit bill, purported to be issued by the Waterbury Bank, of Connecticut, and the agent having neglected to return it for redemption until the 17th day of September following; *Held* that if the duty rested upon the plaintiff to return the bill and notify the bank of the forgery, within a reasonable time after its discovery, the question of negligence, under the circumstances of this case, was for the jury to decide. (*Burrill* agt. *Watertown Bank and Loan Co.*, 51 *Barb.*, 105.)

7. Where the plaintiff was in doubt, and had no ready means of detecting the forgery; *Held* that the duty of returning the bill immediately was not absolute, although its genuineness had been questioned; and that the duty of returning forged paper, in such a case, must begin, if at all, from the time the holder has what the jury shall deem satisfatory evidence of its spuriousness. (*Id.*)

8. The plaintiff's agent having paid out the bill to a third person, supposing it to be genuine, and such third person having neglected for an unreasonable time, after being informed that it was counterfeit, to return it to the agent; *Held* that the defendants' bank could not avail itself of such third person's neglect, to defeat the plaintiff's action. (*Id.*)

9. The defendants, being informed by the plaintiff's agent, on the third day of August, that the bill had been questioned and returned to him, but that he had paid it out again, promising to take it back if it should prove to be a counterfeit, made no answer whatever. *Held* that the jury might find, upon the evidence, that the defendants' bank had acquiesced in this disposition of the bill and thereby waived an immediate return thereof. (*Id.*)

10. The decision in *Thomas* agt. *Todd*, (6 *Hill.*, 340,) requiring a creditor who takes forged bank paper in payment of his debt, to return or offer to return it to his debtor, before he can maintain an action upon an original demand, questioned. *Per* MORGAN, J. (*Id.*)

11. When the facts are not disputed, whether due diligence has been used is a question of law for the court. (*Kelty* agt. *Second National Bank of Erie*, 52 *Barb.*, 328.)

12. The rule is well settled, that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion among intelligent men. (*Wolfkiel* agt. *Sixth Avenue R. R. Co.*, 38 *N. Y.*, 49.)

13. While passengers have no right to jump off the car (of a horse-railroad) while in motion, or to make an attempt to do so, yet they are authorized to prepare to leave, when there is evidence of an intention to stop, or any signal given for such a purpose. The mere preparation to leave a car, while it is in motion, is not of itself negligence. (*Nichols* agt. *Sixth Avenue R. R. Co.*, 38 *N. Y.*, 131.)

14. Where a driver of a street car has been notified by a passenger to stop the car, and does so partially, and then starts on again without notice, he is chargeable with negligence. (*Id.*)

14. Where the facts or inferences to be drawn from them are in some degree doubtful, the only proper rule is to submit the whole matter to the jury, with proper instructions. (*Id.*)

15. The negligence of defendant, whereby plaintiff was injured, being established by evidence, and there being no pretense, that plaintiff was guilty of any personal negligence, the negligence of a third party, contributing to the injuries, furnishes no excuse for the negligence of defendant, and no reason why he should not respond in damages. Hence, in such case, the refusal of the judge to charge, that, if the jury should find that the injuries were in part caused by the negligence of a third party, the plaintiff could not recover from defendant, was not error. (*Webster* agt. *Hudson River R. R. Co.*, 38 *N. Y.*, 260.)

Digest.

NEW TRIAL.

1. Where the preponderance in the evidence is so decided as to lead very naturally to the conclusion that injustice has been done to a party, by the judgment recovered against him, the judgment, under the well settled rules applicable to such cases, should be set aside, and a new trial directed. (*Townsend Manufacturing Co.*, agt. *Foster*, 51 *Barb.*, 346.)

2. Whenever there is good reason for believing that a referee has mistaken the import and preponderance of the evidence given on the trial, and it is evident that injustice has been done, the judgment entered upon his report should be set aside. (*Id.*)

3. There is no rule or provision of law by which judges at general term are authorized to fix the amount of damages proper to be recovered by a person who has suffered from the malicious prosecution of another. If they find that the jury in the court below have erred in their judgment, the matter must be referred to another jury, by directing a new trial. They have no power, in such case, to order the reduction of the verdict to a sum named by them, as the alternative of a new trial. (*Cassin* agt. *Delany*, 38 *N. Y.*, 178.)

4. Where, on the trial of an action upon a promissory note, to which the defense is infancy, the defendant, by clear and uncontradicted evidence, establishes the defense, but the jury disregard the evidence and find for the plaintiff, the judge may entertain and grant a motion upon his minutes to set aside the verdict and order a new trial. (*Algeo* agt. *Duncan*, 39 *N. Y.*, 313.)

5. The fact, that but for such proof the plaintiff who produced the note and read it in evidence, would have been entitled to the verdict, did not deprive the judge of jurisdiction and power to make such order. (*Id.*)

6. Whether such power exists independently of the Code of Procedure, or is to be derived from that section of the Code (264), which authorizes a judge "to set aside a verdict and grant a new trial for insufficient evidence," it exists, and was, in the case stated, properly exercised. (*Id.*)

7. On reversing a judgment for error, and ordering a new trial, the court are not authorized to make it a condition that testimony already taken may be read in evidence upon the new trial. The new trial being a matter of right, the party is entitled to it without qualification. (*Bruce* agt. *Davenport*, 5 *Abb. N. S.*, 185.)

8. *Newly discovered evidence*, upon which to found a motion for a new trial, must not only be *material*, but must have been discovered *since the trial*. (*Dodge* agt. *N. Y. and Washington S. S. Co.*, *ante*, 524.)

9. This question should be tested by the same rules, which would have to be applied to the decision of a motion for a new trial, on the ground of the discovery of this evidence after the final determination of the trial, if such had been the case. (*Id.*)

NOTICE.

1. Where a purchaser of land had not actual notice of the fraudulent intent with which the land had been conveyed to his vendor, yet, if the circumstances were such as would have put a prudent man upon an inquiry which, if prosecuted diligently, would have disclosed the fraud, he cannot be deemed a *bona fide* purchaser in good faith. (*Baker* agt. *Bliss*, 39 *N. Y.*, 70.)

NUISANCE.

1. Every continuance of a nuisance is, in judgment of law, a fresh nuisance. An action can be maintained against the party continuing the nuisance; whether he be the original wrongdoer, or his alienee. (*Conhocton Stone Co.* agt. *Buffalo, New York and Erie R. R. Co.*, 52 *Barb.*, 390.)

2. Although a corporation erecting or continuing a nuisance, had leased the premises on which the same was erected, to another, and given possession, prior to the happening of the injury complained of, it is liable for the damages sustained. (*Id.*)

3. An action for damages will lie against the continuer of a nuisance, without averring or proving a previous notice to him, of the existence and extent of the nuisance, and a request to abate and remove it. (*Id.*)

4. A different rule prevails, however, in respect to the right of the party injured to abate, by his own hand, a nuisance erected on the land of another. As such right involves the privilege of entering upon the lands of another, if such lands are in the possession of an alienee of the wrongdoer, a request must first be made of such alienee, to

abate the nuisance, before an entry can be made by another to do it. (*Id.*)

PARTIES.

1. A party *examines an adverse party*, under §§ 390, 391 and 392 of the Code, at his peril; and whatever evidence is taken, whether before or at the trial, without objection, is competent, and may be used notwithstanding the restriction of § 399. (*Barry* agt. *Galvin*, *ante*, 310.)

2. Under the Code, defect of parties plaintiffs can only be objected to by demurrer, when the defect appears upon the face of the complaint, or by answer, when it does not so appear. (*Patchin* agt *Peck*, 38 *N. Y.*, 39.)

3. Unless objection is so taken, the defect is deemed to be waived. (*Id.*)

4. An improper joinder of parties is not a subject of demurrer. (*Allen* agt. *City of Buffalo*, 38 *N. Y.*, 280.)

5. Where, before the commencement of the action, the plaintiff had made an executory contract of sale of the rents and cause of action for a price to be thereafter paid, reserving to himself the power to revoke the contract upon failure of the purchaser to pay as provided, but authorizing the purchaser in the mean time, and until such revocation, to collect and have the rents, *held*, that the plaintiff was the real party in interest within the meaning of section 111 of the Code; and that an absolute consummation of the sale made by deed after the commencement of the action, did not relate back to, and take effect from the time of the contract, so as to affect the plaintiff's right to recover. (*Van Rensellaer* agt. *Barringer*, 39 *N. Y.*, 9.)

6 Under the law admitting parties to testify in their own behalf, it is well settled, that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was. (*Thurston* agt. *Cornell*, 38 *N. Y.*, 281.)

PARTNERS AND PARTNERSHIPS.

1. Where, in an action upon a promissory note signed in the name of a firm, it is proved that the body and signature are both in the defendant's handwriting, and there is nothing in the signature to indicate that the defendant signed the note as the agent of any other person, the presumption arises that he was one of the makers. (*Vibbard* agt. *Charles Roderick*, 51 *Barb.*, 616.)

2. Where an individual, though not in fact a member of a firm, has held himself out to the plaintiff's and the public as a partner, so that the plaintiffs had reason to believe, and did believe he was a member, and on the faith of his representations trusted the firm, he will be estopped from denying that he was a partner, and liable upon that ground. (*Id.*)

3. It is not necessary that he should have declared, in express terms, that he was such partner; if he held himself out to be such, in other ways calculated and intended to induce the belief of prudent business men, that is enough (*Id.*)

4. Where a creditor has knowledge of the dissolution of a copartnership at the time of giving credit, he cannot recover from the members of the firm who have withdrawn, no matter how the knowledge has been communicated to him. (*Davis* agt. *Keyes*, 38 *N. Y.*, 94.)

5. Either member of a partnership may secure one of its creditors by a transfer of property; and this may be done by an assignment in the nature of a a mortgage, with a trust to account for and repay the surplus, if any. (*McClelland* agt. *Remsen*, 5 *Abb.*, *N. S.*, 250.)

6. Where an action between partners, is brought for a dissolution of the copartnership, and the defendants, on application for a receiver, are permitted in lieu thereof to give their own bond pending the litigation conditioned to manage and take care of the property and to account, &c: On report of the referee appointed in the action finding that the plaintiff is entitled to judgment dissolving the copartnership:

7. *Held*, that the assets must go to pay debts, and the surplus, if any, to the respective parties. It is necessary, therefore, to convert the assets into money, and the usual mode to do that is through a *receiver*. Upon his appointment the assets must go into his possession and the condition of the defendants' bond will be satisfied. (*Trufant* agt. *Merrill*, *ante*, 531.)

8. In the condition of the action, the referee could not *state the accounts;* and it was proper to leave that to be done on the coming in of the receivers account, showing the amount to be distributed. (*Id.*)

Digest.

PATENT RIGHT.

1. The discovery of the principle that *steam* may be made to *pack* in and of itself or to become *self-packing*, is an invention that is the subject of a patent. (*Poillon* agt. *Schmidt. ante*, 77.)

2. It had always been supposed, that ever since steam has been introduced as a motive power, that two contiguous surfaces could be rendered steam-tight, only by actual contact; that consequently, all steam engines had depended for steam-tight moving joints on the contact of smooth surfaces or on elastic packing set steam-tight against its adjacent surface; that in carrying out this idea, great varieties of packing had been devised at great expense. (*Id.*)

3. The fact is now discovered, that steam when introduced into small groves in one or two contiguous surfaces, will itself form a packing without the surfaces being actually in contact. *Id.*)

PAYMENT.

1. A competent authority, having jurisdiction over the subject of assessment for purposes of taxation, and over the plaintiffs' property, assessed the plaintiffs for personal property. The plaintiffs complained and applied to the courts for redress. Before the final decision in the court of appeals, the officer having charge of the collection of taxes gave a notice to the plaintiffs, requiring payment, and stating that in the event of non-payment, a warrant would be issued, to collect the same. The plaintiffs then paid the assessment. There being no warrant, no seizure, no threatened seizure, no payment of money to free its property from the possession of another, no ignorance of facts: *Held* that this was a purely voluntary payment, and no action would lie to recover the same back. (*Union Bank* agt. *Mayor, &c. of New York*, 51 *Barb.*, 159.)

2. Nor can such action be maintained against the city corporation of New York, even if the payment be coercive, taxes being levied and collected under state authority, and the money collected being finally applied by state law. (*Id.*)

3. The delivery of a check does not operate as payment of a previous debt, and a receipt given upon delivery of a check, acknowledging the receipt of money, adds nothing to the effect of such delivery, and is subject to parol proof as to its real import. (*Bradford* agt. *Fox*, 38 *N. Y.*, 289.)

4. In an action for the collection of a pre-existing debt, the *onus* of proving *payment* is upon the *defendant*, and proof of the delivery to, and receipt by, the plaintiff of a check is not sufficient, but he must go further, and show, that, by the *laches* of the plaintiff, a loss has been incurred. (*Id.*)

5. Wherein this case differs from those in which the action is brought by the holder against the drawer of a check, see opinion of GROVER, J. (*Id.*)

6. An agreement to pay a party $1,700 in the lawful currency of the United States, and five hundred dollars in an order on W. & T., does not imply that the five hundred dollar order is to be paid in cash. (*Hinnemann* agt. *Rosenback*, 39 *N. Y.*, 98.)

7. Parol evidence is admissible to show that the order was to be for sash and blinds, and not money; and it is competent to prove that W. & T. were engaged in the manufacture of articles necessarily used in house building (where the contract was for the building a house), to raise the presumption that the parties intended the order for such articles. (*Id.*)

PILOTS.

1. The mode designated by the act of the legislature "to provide for the licensing and government of the pilots, and regulating pilotage of the port of New York," passed June 28, 1853, for the selection of Commissioners of Pilots, viz.: that three of them shall be "elected" by the chamber of commerce, and two of them by the presidents and vice presidents of certain marine insurance companies, (*Laws of* 1853, *p.* 931, §§ 2. 3,) is not an *election* within the meaning of article 10, section 2, of the constitution, requiring all officers whose election or appointment is not therein provided for, or whose offices may be thereafter created by law, to be elected by the people, or appointed; but is an appointment. (*Sturges* agt. *Spofford*, 52 *Barb.*, 436.)

2. The act, therefore, so far as that provision is concerned, is not unconstitutional. (*Id.*)

3. By section 2, of the act of April 3, 1857, "to amend the pilots laws," declaring that the provisions of said act should not apply to vessels propelled wholly or in part by steam * * *

licensed and engaged in the coasting trade, (*Laws of* 1857, *ch.* 243,) it was the intention of the legislature to confine the exemption to those vessels which have taken out a coasting license as provided by the act of congress, by which their business would be confined exclusively to the coasting trade, and it would then be known at the time of sailing that such was their character. (*Id.*)

4. Although a registered vessel possesses all the powers of a coaster without a coastin g license, so far as the carrying of passengers is referred to, yet a register is not a *license*. (*Id.*)

PLEDGE.

1. It is now well settled that an action can be maintained for the *conversion of a chose in action* which has been *pledged as security for a debt*. (*Luckey* agt. *Gannon*, *ante*, 134.)

2. An action to *redeem* is not the only remedy; and where the pledgee has wrongfully disposed of the pledged property, so as to put it out of his power to deliver it, or where upon *payment of the debt* for which it was pledged, and demand for its return, he refuses to return it, it is a *conversion* for which an action will lie. (*Id.*)

3. The evidence in this case of the payment of the debt for which the insurance polices were pledged to the defendant and of the demand and refusal so return the n to the plaintiff, was undisputed, leaving nothing for the jury to determine, and the direction to find for the plaintiff was correct. (*Id.*)

POLICE.

1. Where the board of police commissioners have removed a patrolman from his office or membership, until such determination has been reversed, such member is not at liberty to serve as patrolman, or as a member of the police force. (*The People* agt. *The Board of Police*, 39 *N. Y.*, 506.)

2. Although such removal by the board may be illegal, such alleged deliuqnent is not in duty bound to report himself at roll call, and tender performance of duty, &c.; and his failure to do so is not to be deemed an absence from duty without leave. (*Id.*)

POSSESSION OF PERSONAL PROPERTY.

1. In an action to recover the possession of personal property where it is wrongfully detained, a demand is necessary before suit brought. (*Sluyter* agt. *Williams*. *ante*, 109.)

2. Where a non-suit is granted and a judgment entered for a return of the property, the general term will not reverse, because the judgment is improper, but will leavethe party to correct it by motion at special term. (*Id.*)

3. The constitutional right of *trial by jury*, secured to persons in actions of *replevin*, remain to them in actions under the Code for the *possession of personal property*. (*Baxter* agt. *Putney*, *ante*, 140.)

4. Prior to the constitution of 1846, *replevin* was one of the causes of action of which a *justice of the peace had no jurisdiction*. (*Id.*)

5. In 1860, under the Code, the legislature conferred such jurisdiction on justices of the peace in actions where the value of property claimed did not exceed $100. (*Id.*)

6. *Juries* in courts of record, prior to the constitution of 1846, were composed of *twelve men*, and so have remained to the present time; and the word "jury," as used in art. 1, sec. 2, of the constitution, means a common law jury of twelve men. (*Id.*)

7. When, therefore, a plaintiff brings an action of replevin or for the possession of personal property, under the Code, in a justice's court, if the defendant demands a jury trial by *twelve men*, the justice must dismiss the action, as he has no jurisdiction to summon a jury of only six men. (*Id.*)

8. The rule of general application, that the possession of personal property implies ownership, against the world, is exceptional in certain cases. (*Mayor, &c. of New York* agt. *Lent*, 51 *Barb.*, 19.)

9. On the 2d of December, 1784, the common council of New York, from gratitude for the distinguished services of Gen. Washington, voted an address to him, together with the freedom of the city, in a gold box. At a subsequent meeting of the common council, on the 2d day of May, 1785, the Mayor produced and read a letter from Gen. Washington, in reply to the address, which was addressed to the "Honble. The Mayor, Recorder, Aldermen and

Commonalty of the city of New York." By order of the common council, the address and reply were published, and entered upon the minutes. One A. was in the possession of the letter in the year 1834, and continued to possess it until his death, in November, 1863, when it passed into the hands of his executrix, who, in May, 1864, placed it in the hands of auctioneers, by whom it was sold, at auction, to the defendant L. How A. became the possessor of the letter was not shown; nor did it appear that any offer was made by L. to show title, other than simple possession:

10. *Held*, that the letter was a particular and a peculiar species of property; and that its style, address and character as a response of a legislative act, should of itself be regarded as having imparted notice, to all, that from the moment of its reception and recording it became the property of the corporation to whom it was addressed. (*Id.*)

11. That, unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held A. to constantly recurring notice of its ownership by the corporation. (*Id.*)

12. That the evidence as to title to the letter was of that character which called for a finding by the jury thereon, and their finding in favor of the plaintiffs was conclusive between the parties. (*Id.*)

13. R. a produce, forwarding and commission merchant, on applying to the plaintiffs to discount his promissory note, attached to such note, as collateral, a paper or receipt, signed by him, as follows: "Received in store, for account of Mess. P. & S. subject to their order, the following named property, as security to my note given this day," (describing the note, and specifying the property;) whereupon the plaintiffs received the note and receipt, and advanced to R. the avails of the note. There was no manual or symbolic delivery of the property to the plaintiff, at the time, the same remaining in R.'s store, and he transacting business there as before:

14. *Held*, that the receipt was not a *chattel mortgage;* and, if it were, it was void as against creditors of the mortgagor, because there was no immediate delivery of the property, followed by an actual and continual change of possession, nor was it filed as a chattel mortgage, as required by the statute. (*Parshall* agt. *Eggart*, 52 *Barb.*, 367.)

15. That the transaction, in its legal effect, did not constitute a *pledge*; the subject thereof not having been delivered; and that, although the plaintiffs had, in a lawful manner, before a levy made thereon, under an attachment against R. at the suit of another creditor, obtained the actual possession of the property, they were not entitled to the rights and protection of *bona fide* pledgees. (*Id.*)

16. That the possession of the storehouse, gained by the plaintiffs, with the consent of R. shortly before the property was levied on under such attachment, did not constitute a good delivery, as against the attaching creditor. (*Id.*)

POWER OF ATTORNEY.

1. *General words* in a *power of attorney*, cannot be construed to extend or enlarge the power beyond the subject matter of the agency, as expressed in the previous parts of the instrument. (*Holtsinger* agt. *National Corn Exchange Bank*, *ante*, 203.)

2. Where the power is "to ask, demand, receive and receipt for any and all pay and allowances due me from the Government of the United States, on account of my services (in the army) &c., and to sign my name to any receipt, pay roll, voucher or other acquittance of such dues; * * * with full power to execute and deliver all needful instruments and papers, and to perform all and every act and thing whatsoever requisite and necessary to be done in, and about the premises," with the usual ratifying and confirming clause, it does not authorize the attorney to *indorse drafts* payable to his principal or order, upon the assistant treasurer of the United States. (*Id.*)

3. The defendant, the bank, being without legal title to the drafts by means of void indorsements, acquired no title to the money received upon them, therefore, no objection can be interposed to the maintenance of an action by the payee for its recovery. (*Id.*)

PRINCIPAL AND AGENT.

1. Where an agent, appointed to settle claims against a third party, receives from the debtor promissory notes for the amount, payable at future periods, which are perfectly good and in fact paid when due, and before maturity

sell the same for less than the face thereof, without consulting with or informing his principals, and without making any inquiries of parties with whom funds have been deposited for their payment, and on being called upon to account denies that he has received any thing on the notes, for which he is liable to account, such sale is a clear violation of his duty to his principals, and warrants a finding that the sale was without authority. (*Allen* agt. *Brown*, 51 *Barb.*, 86.)

2. In such a case the principals can recover of the agent the excess of the amount of the notes over and above the sum actually paid to him, under a complaint containing allegations equivalent, in substance, to the count for money had and received, to the whole amount of the notes. (*Id.*)

3. Under such circumstances, the agent is liable upon the ground that the notes which he took in satisfaction of the demand of his principals being good and collectable, and he having by his transaction released the debtor, and deprived his principals of all remedy except against himself, he is to be treated as having made himself answerable to them for the full amount he ought to have received from the debtor. (*Id.*)

4. Although, in general, to support the action for money had and received, it is necessary to prove that the defendant actually received money or its equivalent, for the use of the plaintiff, yet where property is received as money the action will lie, the same as if money had been received. (*Id.*)

5. An assignment, by the creditors, transferring, in terms, to the assignee, all the right, title and interest of the assignors, and each of them, to the notes and the avails thereof, and the moneys received by their agent upon the settling and arranging of the claims against the debtor, passes their right of action against the agent, for money had and received, to the full amount of the notes. (*Id.*)

6. Where such assignment is absolute, and valid on its face, and transfers to the assignee a perfect legal title, his right to maintain an action is not affected by the fact that nothing was paid for the assignment; nor by the circumstance that one of the assignors agreed to take care of the case and to save the assignee from costs if he was unsuccessful. (*Id.*)

7. The fact that the principals were joint owners of the original claims against the debtor will not prevent either of them from maintaining an action to recover his share of the money collected thereon by their agent. (*Id.*)

8. An agent, while in his principal's employ, can accept no employment hostile to the interest of his employer. If he does so, and receives remuneration therefor, it affords good and sufficient ground for his discharge. (*Morrison* agt. *Ogdensburgh & Lake Champlain R. R. Co.*, 52 *Barb*, 173.)

9. Nor can an agent act in the business of his agency, for himself and his principal at the same time. (*Id.*)

10. Thus, and individual employed by a railway company, as its agent, to purchase wood and timber for its use, has no right, while purchasing woodland for the company, as such agent, to receive from the vendor a commission for promoting the sale. (*Id.*)

11. And where such agent, being consulted with by a director of the company about the purchase, examined the land with the latter, and gave his opinion of the quantity of wood thereon, and advised the purchase, but without informing such director that he was offered a commission if he found a purchaser for the land, and under such advice the land was purchased by the company; *Held* that the agent had failed to do his whole duty; and such failure constituted a breach of any contract of employment, and justified his discharge. (*Id.*)

12. *Held, also*, the company having been compelled, through the agent's neglect of duty to pay more for the land than they otherwise would have paid, the difference, being the amount of the agent's commission, in equity belonged to the company. (*Id.*)

13. Where a corporation succeeded certain trustees in the ownership of a railroad, but there was no evidence that, in doing so, it assumed the existing contracts of such trustees, but, so far as appeared, it merely continued an individual as an employee of the road, in the same line of business he was in, under an implied contract to pay, but without any agreement as to time; *Held*, that such employee could be discharged at any time by the company, without liability for further employment. (*Id.*)

14. Where plaintiff agreed with defendant to keep the horses of the latter through the winter, enumerating specifically what he was to furnish and supply to them, and, further, agreed to board a man for the said defendant at two dollars per week, in case the de-

fendant may require a man to take care of said horses. *Held*, that it contemplated, that the defendant should furnish a man to take care of the horses, and, where such man was so furnished, as shown by the evidence in the case, he must be deemed the servant of the defendant, and not of the plaintiff. *Held*, further, that the plaintiff, and the man employed by defendant, could not be regarded as engaged in a common employment, and both as agents or servants of defendant, so as to exempt the latter, as principal, from liability to the plaintiff for the acts of his fellow servant. Hence, the rule in *Wright* agt. *N. Y. Central R. R. Co.*, (25 *N. Y.*, 562, 564) not applicable to this case. (*Stone* agt. *The Western Trans. Co.*, 38 *N. Y.*, 240.)

15. H. was the agent of F. in collecting the amounts due upon his bonds and mortgages. The defendant purchased the premises in question, upon the assurance of H., that they were free from incumbrances, and gave to him his note for the amount unpaid on the purchase. It was soon discovered, that they were subject to the mortgage in suit, belonging to the plaintiff. H. thereupon agreed, that all the money paid to him by the defendant should apply on the mortgage. Various sums were thus paid, which were indorsed upon the defendants note but were not indorsed on the mortgage, nor remitted to the plaintiff. *Held*, that these payments were made to H., personally, and not as the agent of the plaintiff, and that the agreement to apply the same upon the mortgage was the personal engagement of H., and that they did not operate as payments on the mortgage. (*Fellows* agt. *Northrup*, 39 *N. Y.*, 117.)

16. The duties of agents, in the receipt and transmission of money considered. (*Id.*)

17. The agent in a fraudulent disposition of the property of another—not being money nor negotiable paper—is liable therefor to the owner, although he act in good faith, without interest or reward, and in the belief that his principis the owner. (*Spraights* agt. *Hawley*, 39 *N. Y.*, 441.)

17. In order to maintain an action against a common carrier for injuries to goods entrusted to him for transportation, it must be established that the property was *actually delivered* to him, by being placed in such a position that it might be taken care of by the carrier or his agent having charge of the business, and under his immediate control. To show that such agent was notified, does not make out a valid acceptance and delivery. The place of delivery is important, and due care must be used to leave the property where it is not exposed to danger. (*Grosvenor* agt. *New York Central Railroad Company*, 5 *Abb. N. S.*, 345.)

18. *It seems*, that if a principal sanctions the performance of a duty by persons in his employment other than the one who is actually the agent having charge of that particular department, having thus held out to the world that they are authorized agents, he cannot relieve himself from responsibility by repudiating their acts. (*Id.*)

PUBLIC OFFICERS.

1. In construing statutes, prescribing a time for the performance of acts by public officers, and in the performance of which the public have an interest, if the act itself does not prohibit the doing of such act after the expiration of the time fixed, the act is deemed valid, if performed afterward. (*Juliand* agt. *Rathbone*, 39 *N. Y.*, 369.)

2. But such rule of construction is not to be applied to the acts of private parties, when the law to be construed creates no new right or remedy, but is designed to regulate one already existing. (*Id.*)

RAILROADS.

1. A *railroad company*, organized under the general statute of the state (1850), is required, in *crossing a highway*, to restore the highway thus crossed to its former state, or to such state as not unnecessarily to impair its usefulness. (*People, ex rel., Town of Schaghticoke*, agt. *Troy and Boston Railroad Co.*, *ante*, 427.)

2. And where it becomes necessary, in crossing a highway, that a *bridge* should be built over the railroad to restore the highway to its usefulness, the railroad company are bound to build the bridge and *continue it in repair*, as long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise. (*Id.*)

3. The mere *abandonment of the railroad and the removal of its track, and its entire disuse* is not enough to deprive the railroad company of the privileges of its franchise or to absolve it from maintaining and keeping in repair such bridge. (*Id.*)

4. A *mandamus* is the proper remedy to

compel the railroad company to keep and maintain the bridge in proper repair. (*Id.*)

5. The doctrine that the rolling stock of a railroad company in all cases is to be considered as personal property, and as not passing under a mortgage of the road and its appurtenances, not acceded to. (*Hoyle* agt. *Plattsburgh and Montreal R. R. Co.*, 51 *Barb.*, 45.)

6. Where it was found by the referee, and was conceded, that a mortgage of its road and franchise, executed by a railroad company, was sufficient to include in the mortgaged property the rolling stock, and the parties intended that the rolling stock and equipments of the road should pass, as a part of the road and as necessary to its use; the object of the mortgage being to provide funds for the building of the road and preparing it for travel, and the intent of the parties was to secure the bondholders by a mortgage on the whole property in the road as used by the company for travel; *Held* that such a construction should be given to the instrument as to include therein the rolling stock, although not expressly named. (*Id.*)

7. The 28th section of the general railroad act, (*Laws of* 1850, *p.* 211,) authorizing railroad corporations to borrow money for the building of their roads, or operating them, and to mortgage all their corporate property and franchises to secure the payment thereof, contemplates a mortgage of all the property, whether land, road, rolling stock or franchise, and warrants the conclusion that it was the intent of the legislature that the whole should be included in one mortgage and treated as a mortgage of the road and its accessories. Such a mortgage need not be treated as a chattel mortgage, and filed as such, in order to give it validity as against judgment creditors. (*Id.*)

8. Under ordinary circumstances, where a corporation has earned a dividend, and it desires to retain the moneys so earned, for the purposes of the company, either in making improvements on its property or for the payment of its debts, it would be no violation of law to retain such moneys and in lieu thereof to issue to the stockholders a corresponding amount of stock. (*Howell* agt. *Chicago and Nothwestern R. R. Co.*, 51 *Barb.*, 378.)

9. The election to do either rests with the board of directors, and if the company has the power to increase the capital stock, for any purpose, either mode of making such increase is not a violation of law, and affords no ground for an injunction to restrain them. (*Id.*)

10. If a corporation has the power to increase its capital, it is immaterial whether such increase is made by awarding the stock to stockholders as dividends, in lieu of money, retaining the money for the purposes of the company, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market, to raise money for the use of the corporation. (*Id.*)

11. It may be doubted whether a statement, made by a board of directors, in a report, avowing their determination not to make any further increase of the capital stock, would be sufficient to warrant the restraining of the company from doing an act expressly authorized by statute; or even if it had such an effect, as to the board by which it was made, whether any subsequent board could thus be deprived of the powers conferred upon it by law. *Per* INGRAHAM, J. (*Id.*)

12. By an act of consolidation, between railroad companies, it was agreed that the preferred stock should be entitled first to seven per cent from the income of the consolidated road; then the common stock was to have seven per cent; then the preferred stock was to have three per cent. further; and afterwards the common stock could share in the balance. Subsequently a dividend was declared by which ten per cent on the amount of the capital was awarded to both classes of the stock, but such dividend was made payable in preferred stock to the holders of preferred stock, and in common stock to the holders of stock in that class. By this distribution, at the then value of the stock, the holder of a share of preferred stock received stock to the market value of about $8, and the holder of a share of common stock received stock to the value of about $7. *Held* that this gave to the holder of the common stock all he had a right to claim, and all that he was entitled to until the dividend of the preferred stock amounted to ten per cent. And that whether, therefore, the dividend was estimated in the nominal value of the stock, or as the cash value, there was no departure from the contract with the holders of the preferred stock, in such dividend. (*Id.*)

13. Where a railroad company, under the permission given by the act of the legislature of 1836, chapter 316, con-

tracts with the chiefs of a nation of Indians, for the right to construct its road upon the land of such Indians; the contract giving the company the right to make and use its road upon such land, without any limitation of time as to the enjoyment of the right; although the fee of the land is not vested in the company—that being prohibited by the statute—yet such land is "owned" by the company, within the contemplation of the section of the Revised Statutes touching taxation, (1 *R. S.*, 387, § 1,) and is liable to be assessed as property occupied by the company, as a railroad, in the town in which it is situated. (*The People* agt. *Beardsley*, 52 *Barb.*, 105.)

14. All real estate owned, possessed or appropriated for use by railroad companies is to be assessed. (*Id.*)

15. An agent, while in his principal's employ, can accept no employment hostile to the interest of his employer. If he does so, and receives remuneration therefor, it affords good and sufficient ground for his discharge. (*Morrison* agt. *Ogdensburgh and Lake Champlain R. R. Co.*, 52 *Barb.*, 173.)

16. Nor can an agent act in the business of his agency, for himself and his principal at the same time. (*Id.*)

17. Thus, an individual employed by a railroad company, as its agent, to purchase wood and timber for its use, has no right, while purchasing woodland for the company, as such agent, to receive from the vendor a commission for promoting the sale. (*Id.*)

18. And where such agent, being consulted with by a director of the company about the purchase, examined the land with the latter, and gave his opinion of the quantity of wood thereon, and advised the purchase, but without informing such director that he was offered a commission if he found a purchaser for the land, and under such advice the land was purchased by the company; *Held* that the agent had failed to do his whole duty; and such failure constituted a breach of any contract of employment, and justified his discharge. (*Id.*)

19. *Held, also*, that the company having been compelled, through the agent's neglect of duty, to pay more for the land than they otherwise would have paid, the difference, being the amount of the agent's commissions, in equity belonged to the company. (*Id.*)

20. Where a corporation succeeded certain trustees in the ownership of a railroad, but there was no evidence that, in doing so, it assumed the existing contracts of such trustees, but, so far as appeared, it merely continued an individual as an employee of the road, in the same line of business he was in, under an implied contract to pay, but without any agreement as to time; *Held*, that such employee could be discharged at any time by the company, without liability for further employment. (*Id.*)

21. By the charter of the Hudson River railroad company, the corporation are relieved from any obligation to maintain fences, where their railroad is constructed in the river, and this exemption is not changed or removed by the provisions of the general railroad act of 1848. (*Schermerhorn* agt. *Hudson River R. R. Co.*, 38 *N. Y.*, 103.)

22. The different channels or creeks separating and flowing around intervening islands in the stream, though, in local usage, receiving different names, are a part of "the river," not less than the main channel itself. (*Id.*)

23. In 1852, the mayor and common council of New York granted to plaintiffs the right to construct a railroad in said city. The plaintiffs conveyed this grant to the defendant, a corporation, in which the grantees (plaintiffs) all became corporators, and a majority of the directors of which were grantees at the time of incorporation. The conveyance contained no covenant on the part of the company to pay the plaintiffs any sum whatever, for the grant. The road was constructed and equipped by the company. It appears that, by a resolution of the board of directors, an indebtedness by the company to the grantees (plaintiffs), in the sum of $200,000, was acknowledged for the grant. This action was brought to enforce payment of that sum; and judgment was found in favor of the plaintiffs by the referee before whom the cause was tried, which was reversed, and a new trial ordered by the general term:

24. *Held*, That the grant to plaintiffs was absolutely void, the mayor and common council having no power to make such grant. Hence, the plaintiffs never conveyed anything of value. (*Coleman* agt. *Second Avenue Railroad Company*, 38 *N. Y.*, 201.)

25. Section three, of chapter 140, Laws of 1861, makes valid such grants in favor only of such parties, and their assigns, as have wholly, or in part constructed the road authorized by the

grant. That party in this case was the defendant. (*Id.*)

26. The grantees (plaintiffs) acting as directors of the company, and composing a majority of the board, could not make a bargain with themselves as individuals, binding upon the company, to purchase the grant of plaintiffs upon terms fixed by them as directors. (*Butts* agt. *Wood*, 37 *N. Y.*, 317.) Nor could they create, revive or continue, a debt to themselves, against the company, by passing resolutions to that effect, as directors. (*Id.*)

27. The statute of limitations was a bar to the action of plaintiffs, the conveyance of the grant being more than six years prior to the commencement of the action; and, though the instrument of conveyance was under seal, the action not being brought upon the instrument, but upon the promise of the company, expressed or implied, to pay in consideration of the conveyance, the transaction is clearly brought within the statute. (*Id.*)

28. The plaintiffs having based their claim to recover entirely upon the validity of the acts of the grantees (themselves), as directors, and the judgment of the referee in their favor being likewise based upon this only, there is no foundation to a judgment to the effect, that, as the company repudiate the acts of the directors in purchasing the grant, they must restore the grant to the plaintiffs. No such judgment is asked by the plaintiffs. (*Id.*)

29. The acts, to enforce which this action was brought, being invalid, no other judgment can be rendered, than one affirming the reversal of the referee's judgment. (*Id.*)

30. Where an order reversing judgment, and directing a new trial, is made by the general term, upon questions of both law and fact, it is the duty of the court, under section 298 of the Code, upon an appeal from such order, to determine whether it was correctly made on either ground. (*Id.*)

31. Section forty-four of the general railroad act of 1850, as amended by section eight of the act of April 15, 1854 (*Laws of* 1850, *ch.* 140, § 44; *Laws of* 1854, *ch.* 282, § 8), imposes the duty upon railroad companies to fence both sides of their track, and they are liable for damages done to cattle, so long as such fences are not made and kept in good order. (*Sheppard* agt. *The Buffalo, New York and Erie R. R. Co.*, 35 *N. Y.* 641.) (*Tracy* agt. *The Troy and Boston R. R. Co.*, 38 *N. Y.*, 433.)

32. The fact, that a railroad crossing is at or near a depot, and that to construct a cattle-guard there would inconvenience the company, will not excuse them from complying with the positive requirement of the statute, requiring such protection to be provided. (*Bradley* agt. *The Buffalo, New York and Erie R. R. Co.*, 34 *N. Y.*, 427.) (*Id.*)

33. This action was for damages for killing a cow through the alleged negligence of the defendant. The injury complained of was caused by an engine of the defendant, while running, not upon its own track or road, but upon that of the Troy Union railroad company, a corporation that embraced the directors of the Troy and Boston railroad company, and also of other companies, who alone, by the charter of the Troy Union railroad company, and a contract therewith, were authorized to operate the road of the latter. The defense to the action was, that the Troy and Boston railroad company were not liable for injuries caused by running their engines upon the track of the Troy Union railroad company, without erecting or maintaining the fences or cattle-guards required by statute. Negligence generally was also denied. *Held*, that the defendant was essentially an owner and operator of the road, and, within the spirit and intent of the statute in regard to fences, was liable for the injury complained of. (*Id.*)

34. The lessee of a railroad, while operating it, is liable if the fences are not maintained. (*Clement* agt. *Canfield*, 28 *Verm.*, 302. (*Id.*)

35. An act, induced by public consideration, the purpose of which is to protect the traveling public, and the owners of domestic animals, along the line of a railroad, should receive a liberal construction to effectuate the benign purpose of its framers; and every statute should be exponnded, not according to the letter but according to the meaning. (*Id.*)

36. The settled principles of law applicable to this case are:

37. That parties seeking to recover for injuries occasioned by the negligence of another must be shown to be themselves free from negligence contributing in any degree to the injury complained of. (*Gonzales* agt *New York and Harlem R. R. Co.*, 38 *N. Y.*, 440.)

38. A person attempting to cross the track of a railroad must make use of his ordinary faculties, to ascertain if there is danger in the attempt, or he

will be held guilty of negligence. (*Id.*)

39. Where the facts are uncontroverted, the question of negligence is a question of law for the court. DWIGHT, J. (*Id.*)

40. The case in its facts, which will be found in the opinion, exemplifies a neglect of the second proposition above cited, whereby negligence is imputed to the injured party by the court (*Id.*)

41. It was error in the court to refuse to charge as requested by the defendant, that it was the duty of the injured party, who knew a train was just due, to look in the direction from which it should come, before attempting to cross the railroad track, and that, if he omitted to do so, he was guilty of negligence which precluded a recovery. (*Id.*)

42. In an action against a railroad company to recover damages for the negligent killing of a person, the plaintiff introduced evidence tending to show that the bell was not rung nor the whistle blown at the crossing where the accident occurred, as required by the statute. *Held*, that the absence of this statutory signal was evidence of negligence which would permit the jury to hold the railroad company responsible. *Held*, also, that the running of an engine across much frequented thoroughfares, as the streets of a village, by a fireman alone, without an engineer, as was proved in this case, would justify a jury in finding a want of proper care on the part of defendants. *Hence*, the defendants' motion for a non suit at the close of plaintiff's evidence, in which the above facts were disclosed, was properly denied. (*O'Mara* agt *Hudson River R. R. Co.*, 38 *N. Y.*, 445.)

43. It is the duty of the engineers to exercise greater care towards the young, as well as towards the aged and infirm, than to persons of mature years or of more active bodily powers, and the same foresight and vigilance cannot be demanded of the former, in guarding against dangers, that would be of the latter. What might be negligence in a person of mature years might not be negligence in a boy eleven and a half years old. *Hence*, it would seem that the general question of the contributory negligence of the person injured was, in accordance with the uniform tenor of decisions in our courts, properly left to the jury. (*Id.*)

44. Both principle and authority concur in maintaining that a jury would have the right, acting upon their own knowledge and without proof, to say that the services of a boy from eleven until twenty-one years of age were valuable to his father, and to estimate their value which is equivalent to a decision that $1500 are not excessive damages to award in such case. See opinion of HUNT, Ch. J., and cases cited. (*Id.*)

45. The negligence of defendant's agent, a car driver, whereby the plaintiff, an infant between three and four years of age, was injured, is disputed. The present issue arises upon the alleged contributory negligence of the child and of his parents or guardians:

46. *Held*, that the escape of a child into the street, through an open window coming to within four feet of the floor, this being his only means of egress, the doors being locked, will not warrant the conclusion, as a matter of law, that the parent was guilty of negligence. At most, the question of fact should be submitted to the jury. GROVER, J. (*Mangam* agt. *Brooklyn R. R. Co.*, 38 *N. Y.* 455.)

47. *Held*, also, that an infant, three or four years of age, is not to be deemed *sui juris*, and is incapable of forfeiting his remedy against a conceded wrong doer, by reason of his own personal negligence. MASON, J. (*Id.*)

48. Hence, upon proof of facts and conditions like the foregoing on part of plaintiff, the court were not justified in non-suiting him. (*Id.*)

49. Where there is any doubt as to a child being of such age and capacity that, in law, he should be held *sui juris*, it should be left to the jury to say by their verdict whether he is so or not. (*Id.*)

50. There is no rule of law requiring a railroad company to keep a flag-man at the crossing of a public street by its track, to give to passers by notice of the approach of trains. (*Ernst* agt. *Hudson River R.R. Co.*, 39 *N. Y.*, 61.)

51. The company have the right to run their trains carefully and prudently on their track, so as not, in the exercise of their own right, to injure others in the prudent exercise of their rights. But, beyond this, it cannot be said, that the company is also bound to place a flagman at the crossings of the road. (*Id.*)

52. The company, for their own convenience, may elect to place a flag-man at certain crossings, and, by establishing a practice of that kind, they may make a law binding upon themselves. (*Id.*)

53. Where, by such voluntary and con-

tinued practice, it has become notoriously public, that a flag-man is placed at such crossing to give notice of the approach of trains, then to withdraw such flag-man without notice, may be come an act of negligence on the part of the company, for which they would be liable. *(Id.)*

54. A traveler approaching a railroad track is required to use his eyes and ears so far as there is opportunity, if he would avoid the imputation of negligence, even though the company may neglect the proper signals. *(Id.)*

55. When a railroad company admits passengers into a caboose car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury. *(Edgerton* agt. *New York & Harlem R. R. Co.*, 39 *N. Y.*, 227.)

56. Where deceased was killed in attempting to cross the railroad track within the limits of the public highway, and at a public crossing, if it appear, that deceased would have seen the approaching cars, in season to have avoided them, had he first looked before at tempting to cross, it will be presumed that he did not look; and, by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery. *(Wilcox* agt. *Rome, Watertown and Ogdensburgh R.R. Co.*, 39 *N. Y.* 358.)

57. A traveler in crossing a railroad track is required to exercise, at least, ordinary sense, prudence and capacity—which requires that he should use his ears and eyes, so far as he has an opportunity to do so; and a failure to do this will be deemed to be negligence sufficient to preclude a recovery in his favor, in case of accident. *(Id.)*

58. The negligence of the company in not ringing the bell, or sounding the whistle, does not excuse the other party from the exercise of ordinary care and prudence in attempting to cross the track of the road. *(Id.)*

59. The establishing and running a horse railroad in the public streets of the city of Rochester held to be an imposition of an additional burden upon the land of an adjoining proprietor covered by such street. *(Craig* agt. *Rochester City & Brighton R. R. Co.*, 39 *N. Y.* 404.)

60. And that such proprietor could maintain a suit to enjoin, perpetually, the railroad company from laying down such track in the street, and from running their cars over the same. *(Id.)*

61. A railroad corporation, having employed skillful and competent persons to supervise and inspect its road-bed and bridges, and having made it their duty to do so, is not liable for an injury to an employee, occasioned by the falling of one of its bridges, where the defect was such as was not apparent, and of which it had no notice. *(Warner* agt. *Erie Railway Co.*, 39 *N. Y.*, 468.)

RECEIVER.

1. Where an individual is declared by the court to be a *mortgagee in possession* of mortgaged premises, and in effect to be a *trustee of the equity of redemption* of such premises, and is subsequently appointed *receiver* of the same property, his claims and interests, individually, must not be permitted to interfere with his duties as receiver, or with the purposes or interests for which he was appointed. *(Bolles* agt. *Duff. ante*, 162)

2. In this case, *held*, that it was the duty of the defendant *as receiver*, to increase the surplus beyond what should be found due him as mortgagee, by getting as large a rental as he reasonably could for the trust property, (the Olympic Theatre in the city of New York). *(Id.)*

3. That the circumstances under which the order appealed from was made, authorizing the defendant, as receiver, to lease the premises to the lessee therein named, show that it was highly probable that the defendant did not make his application to the court with the good faith and impartial and disinterested purpose called for by his office or position of receiver; and such circumstances also show that the court should have carefully scrutinized the application and that the order should not have been made without further inquiry, by a reference or otherwise, as to the situation and value of the property, and the propriety of making the order. *(Id.)*

4. *Held* also, that the order appealed from was inadvertently made, without sufficient consideration being given to the circumstances, and that the application for it was made by the receiver with a motive or purpose, inconsistent with his duty and position as receiver. The order *reversed* with the privilege to the present lessee to hold the premises for one year from the date of his lease. *Id.*)

5. A *receiver* may be appointed in an action for the recovery of possession of real estate, and damages for the withholding of the same. (*This is adverse to Thompson* agt. *Sherrard*, 35 *Barb.*, 593.) (*Ireland* agt. *Nichols*, *ante*, 222.

6. Where the plaintiff prosecutes his action for the possession of premises, on the ground that the premises have been *sub-let* by the lessee contrary to the terms of the lease, thereby involving a *forfeiture* of the lease, he does not waive this legal cause of action by claiming the equitable relief of the appointment of the receiver, to receive the rents and profits of the premises and to prevent waste during the remainder of the term. (*Id.*)

REDEMPTION OF LANDS.

1. A subsequent party in interest, whether by way of mortgage, lease or judgment, cannot on a motion obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected. (*Douglass* agt. *Woodworth*, 51 *Barb.*, 79.)

2. Where such a motion is made in a foreclosure suit, after the property has been sold and the deed delivered, by lessees for a term of years, alleging that they were misled by erroneous information, all that can be done is to open the judgment, set aside the sale and the conveyance, allow the lessees to put in an answer, and order a resale of the property. (*Id.*)

3. This can only be done on terms of indemnifying the purchaser, repaying to him the money paid by him on the purchase, and all expenses incidental thereto. (*Id.*)

4. The purchaser, in such a case, should have the election of permitting the resale, or of ratifying the lease to the applicants; and if he elects to do the latter, the sale should not be disturbed. (*Id.*)

5. *It seems*, the proper remedy of the lessees is to claim the value of their lease out of the surplus, rather than by motion to redeem. (*Id.*)

REFERENCE AND REFEREES.

1. The *written consent* required by section 270 of the Code to refer an action for divorce, is sufficiently made; and the statute complied with, where an *order of reference* is drawn by the attorney for one of the parties and submitted to and approved by the attorney of the other party, reciting as follows: "Upon the consent of the attorneys for each of the above parties given in open court, it is ordered that this action be and the same is hereby referred" &c.* (*Waterman* agt. *Waterman*, *ante*, 36.)

2. The Code does not allow of a reference, in an action of divorce or any other referable action, to take the evidence and report it to the court with the opinion of the referee merely; nor of any reference except for a trial of the issue in a case where an issue has been joined in the action. (*Id.*)

3. Where on the pleadings and proofs of loss submitted by the plaintiff, consisting of one hundred and forty-five items of goods consumed by fire, of the alleged aggregate value of $11,127.24, and of forty-nine items of goods saved from the fire but damaged to the extent of $263, a *reference*, of the action on motion, was properly granted. (*Batchelor* agt. *Albany City Ins. Co.*, *ante*, 399.)

4. Such an account is an essential element in the cause of action, and forms a part of the basis of the action; for until it is rendered no cause of action exists, and when rendered it limits and controls the recovery. (*Id.*)

5. And where it is found and decided by the special term, that the account in question is a long account within the meaning of § 271 of the Code; that no difficult questions of law are involved, and the allegations of the answer being insufficient to raise an issue of fraud, the order of reference appealed from should not be disturbed. (*Id.*)

6. The rule laid down in *Whittaker* agt. *Desfosse* (7 *Bosw.*, 678), authorizing a reference in actions involving the examination of a long account, approved and followed—which is substantially: That it is sufficient if it appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first named issue at all; that whether the whole of the issues shall be referred, or the taking of the account merely; and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court at special term, to be governed by the particular circumstances of each case. (*Id.*)

7. Also, if there is any evidence laid before the court below, that the examination of a long account will be required, and that evidence is uncontradicted, or if there is a conflict of proofs created by the counter affidavits, then the determination of the court below must be held final and conclusive. (*Id.*)

8. The findings of fact by a referee are not the subject of review in this court, except where the supreme court has reversed a judgment upon questions of fact, and so stated in their order; it is, in such case, upon appeal brought within jurisdiction of this court. (*Colwell* agt. *Lawrence*, 38 *N. Y.*, 71.)

9. Where a specific finding by a referee is desired, it should be required by a request to that effect; and, if refused, remedy should be sought in the supreme court; it cannot be found in this court, upon a general exception, that the referee has not found upon various matters claimed to be in issue. (*Id.*)

10. Whether, upon a request to find upon questions deemed material, and a refusal by the referee to find either way, an exception will lie which would be available in this court, *quere*. (*Id.*)

11. A referee, who has made his decision and submitted his report, becomes *functus officio*, and cannot again act without being set in motion by the court.. (*Trufant* agt. *Merrill*, *ante*. 531.)

REFORMATION OF CONTRACT.

1. An instrument cannot be *reformed* on the ground of *mistake* by one of the parties to it. It must be a case of *mutual mistake* by both parties, where there is no question of fraud involved, to authorize a reformation of the alleged mistake. (*Mills* agt. *Lewis*, *ante*, 418.)

2. Thus, where the plaintiff specially authorized his agent to sell a colt, which belonged to the plaintiff, to the defendant, and to take in payment therefor, a mortgage which the defendant owned, provided the defendant would guarantee the *payment* of the mortgage; and on negotiation between the agent and the defendant, the latter refused to guarantee the payment of the mortgage, but would guarantee its *collection* only, which the agent consented to take; and on drawing the assignment of the mortgage by the scrivener of the defendant, instead of drawing it with a guarantee of collection, he drew it with a guarantee of *payment*, and the defendant executed it without reading it, and it having been delivered to the plaintiff without notice of any mistake having occurred on the part of the defendant, and being such a guarantee as he required, he thereupon delivered to the defendant the colt:

3. *Held*, in an action on the guarantee by the plaintiff, that this not being a case of mutual mistake, and the plaintiff being free from any imputation of fraud, and the mistake happening through the scrivener of the defendant, the result was that there never was a meeting of the minds of the parties as to the sale; and it was competent for the defendant to return the colt and rescind the contract, which was the only relief to which she was entitled; and the defendant not having done this, judgment must be ordered for the plaintiff for the amount due upon the mortgage and interest. (*Id.*)

RELEASE.

1. The law implies the release and discharge of a right of action when, the creditor voluntarily delivers to his debtor the bond, note or other evidence of his claim. (*Beach* agt. *Endress*, 51 *Barb.*, 570.)

2. After the money due upon a bond or undertaking has been paid by the obligors, and receipted in full on the back of the bond by one of the obligees, and the bond delivered up to the obligors for the purpose of being canceled, no action is maintainable thereon, in the absence of any allegation of fraud, or mistake. (*Id.*)

3. Even if the payment made does not fulfill, completely, the measure of the obligation, it is perfectly competent for the obligees to waive the right to further performance, and surrender it to be canceled. And it having thus, by the voluntary act of the obligees, become defunct as a subsisting obligation, no subsequent occurrences can revive it in their favor, without the assent of the obligors. Hence, an action cannot be maintained thereon, even assuming that the obligees might have retained the undertaking, for further indemnity or security, had they so elected. (*Id.*)

4. Where a bond is delivered up, by one of two joint obligees, to be canceled, the assent of his co-obligee will be presumed, if he makes no objection and takes no steps in a contrary direction till after the lapse of several years. Besides, the act of his joint obligee is binding upon him, and his assent need not be shown. (*Id.*).

5. A release by the judgment creditor, from the operation of a judgment, of lands in which it is thought the judgment debtor may have some contingent interest, and to relieve the premises from the possible cloud arising therefrom, does not exonerate the surety of such judgment debtor, where it is shown, that the judgment debtor has, *in fact*, no interest whatever in the lands so released, and that the judgment was in consequence no lien upon such lands. (*Blydenburgh* agt. *Bingham*, 38 *N. Y.*, 371.)

6. The relation of the judgment creditor to the property released must possess more than a suppositious or immaginary value and advantage, in order that the release shall discharge the surety from liability. (*Id.*)

SAILORS SNUG HARBOR.

1. Where the trustees of a charitable asylum are authorized to direct the administration of the trust, and clothed with power to make necessary rules for its government, the action of the trustees or executive committee in investigating a charge, against an inmate, of a violation of the rules made by them, and in expelling him therefor, is subject to review by the supreme court. (*People ex rel. Norman* agt. *Sailors Snug Harbor*, 5 *Abb., N. S.*, 119.)

2. Regulations of an asylum for aged seamen, which forbid inmates to leave the premises without permission from the governor or an assistant, and enjoin quiet demeanor at the table, on pain of expulsion, are reasonable regulations, and an expulsion for a breach of them is lawful. (*Id.*)

3. In the absence of any provision of the charter or by-laws on the point, the court will not deem the govenor of an asylum vested with the power to expel an inmate without the authority of the trustees, or at least of the executive committee. (*Id.*)

4. The accused inmate should have notice of the examination of the charges against him, and an opportunity of being heard. (*Id.*)

SALE.

1. A contingent remainder is not subject to levy and sale on execution. The statute is not broad enough to include future estates in expectancy among those estates or interests in land which may be sold on execution. (*Jackson* agt. *Middleton*, 52 *Barb.*, 9.)

2. Compliance, by the commissioners of the land-office, with the provisions of section sixty-five, in relation to giving occupants of lands, directed to be resold for non-payment of dues thereon, notice to remove, is not made a condition precedent to the power of sale, and the validity of the sale is, therefore, not dependent upon a compliance with these conditions. (*Candee* agt. *Haywood*, 37 *N. Y.*, 653.) (*Allen* agt. *Commissioners of the Land Office*, 38 *N. Y.*, 312.)

3. It seems, that these provisions are not made in the interest of occupants of such lands, but to afford to the commissioners a means for their speedy removal therefrom. (*Id.*)

4. Section twenty-three, Revised Statutes which provides that, within forty-eight hours after a sale, the purchaser shall pay the first payment, &c., is not applicable to the case of a resale of lands for neglect to keep up payments, but only to a case of the first or original sale by the state. Hence, the objection that such resale was void, where the first payment was not made within forty-eight hours, was not well taken. (*Id.*)

5. Even if the section were applicable to the case of a resale, or—what is the same—in case of neglect to comply with the provision upon an original sale, it is a privilege which the state may enforce or waive in its pleasure, and having waived it, and accepted the payment subsequently, the sale is valid. (*Id.*)

SALE AND DELIVERY.

1. The general rule as to the *time of the delivery of goods sold* is, that where goods are to be delivered, and no time is specified in the contract, it is a presumption of law that the parties intended and agreed that they should be delivered in a *reasonable time*. What is a reasonable time is a question of law. (*Jones* agt. *Fowler*. *ante*, 104.)

2. Where cotton was sold by bill on the 21st of the month, to be received by the purchasers from the wharf, without specifying any time of delivery, *held*, that a delay of four days in tendering a delivery was unreasonable, and that the refusal or neglect of the sellers to deliver on the demand of the purchasers on the 21st and 22nd relieved the latter from all responsibility. (*Id.*)

Digest.

SANITARY DISTRICT.

1. In the village of Jamaica, Queens county, N. Y., a village ordinance was passed in July 1868, entitled an "Ordinance in relation to manure and other offensive substances." The first section of which reads as follows: "It shall not be lawful for any person, persons or corporations, to unload, discharge or put upon, or along the line of any railroad, street or highway, or public place within the boundaries of this village, any manure, offal or other offensive substances, from the first day of June to the first day of October, in each and every year, under the penalty of $50 for each and every offense. Nor shall cars or flats loaded with these or similar offensive substances, be allowed to remain or stand on or along any railroad, street or highway, in this village, under a like penalty of $50 for each and every offense:"

2. On appeal from a judgment rendered by a police justice of the village of Jamaica, against the defendants for the penalty of $50, incurred under the last clause of section one of the ordinance above mentioned:

Held, 1st. That the answer of the defendants having expressly denied that they were a corporation, it was a *failure of proof* on the part of the plaintiffs in not proving the incorporation of the defendants. (*Village of Jamaica* agt. *Long Island Railroad Co.*, *ante*, 379.)

3. 2nd. That the act of the legislature in 1866, creating the *metropolitan sanitary district and board of health* therein, which includes the towns of Jamaica, Flushing and Newtown, in the county of Queens, entirely *supersedes* the ordinance of the village of Jamaica, aforesaid, on this subject; and not only supersedes it, but *absolutely prohibits* any action by the village under the ordinance. (*Id.*)

4. And 3d. That that part of the village ordinance under which this action is brought (if operative), is so broad in its language, as to interfere with the rights and privileges conferred upon railroad corporations by the general laws of the state, and is therefore *void*. (*Id.*)

SERVICE.

1. Motion papers to set aside a judgment of divorce granted by default, and for leave to the defendant to come in and defend, are properly served on the *attorneys for the plaintiff* in the judgment, although made nearly two years after the entry of judgment, and after the attorneys for the plaintiff had settled with their client, and they themselves had dissolved partnership. (*Miller* agt. *Miller*, *ante*, 1.)

SET-OFF.

1. Action by R. against C., for damages for a tort; at the same time action by C. against R. for rent. Referee reports on the same day in favor of each plaintiff respectively. On this day, also, without fraud or collusion, C. assigns his claim to one T. for a valuable consideration, and, on application, judgment is entered in T's name. Subsequently, R. perfects his judgment against C., on which executions are issued, and returned unsatisfied:

2. This action was brought by R. to compel a set-off of the judgment obtained against him by C., toward the judgment obtained by him against C:

3. *Held*, that R. had no right to such set-off at the time of the assignment of the claim against him, and that he acquired no such right subsequently. (*Roberts* agt. *Carter*, 38 *N. Y.*, 107)

SHERIFF.

1. Under section 243 of the Code of Procedure, which provides that the sheriff shall be entitled to poundage upon the amount paid on the "settlement" of an attachment suit, the sheriff is entitled to poundage where an arrangement is made by which the defendants agree to pay certain drafts if the suit shall be discontinued, and this is done, and the money paid. (*Pritchard* agt. *Bank of California*, 51 *Barb.*, 184.)

2. It is only *illegal* acts, done by color of office, that are declared void by section 59 (2 R. S., 286.) A covenant by the receiptor to return the property levied on by a sheriff, and left in receiptor's care, at his request, or to pay the debt, is not void, and will be enforced. Hence, a motion for nonsuit, upon the ground, that such covenant is void, was properly denied. (*Cornell* agt. *Dakin*, 38 *N. Y.*, 253.)

3. In an action to recover upon a covenant by the receiptor, to deliver the property receipted for, or pay the judgment debt, which the execution, under which the levy was made, was intended to satisfy, it is not competent for the defendant (receiptor) to show, that the property in question did not, in fact,

belong to the execution debtor, and that this fact was made known to the sheriff at the time; nor is the inadmissibility of such testimony cured by an offer to show, in connection therewith, that, at the time, the execution debtor had no property whatever upon which the sheriff could levy, such testimony, being likewise inadmissible. (*Id.*)

4. A party, giving a receipt for property seized by an officer, upon an execution or an attachment is estopped from setting up against the officer, that the property was his own, or that of any person, other than the execution or attachment debtor (*Id.*)

5. Neither, in such action, is it competent for the defendant to show, as bearing upon the measure of his liability, that the property was worth a sum less than the debt, which, in default of returning the property, he covenanted to pay. Such evidence was properly excluded. (*Id.*)

6. The liability of a receiptor to the sheriff is as broad as his covenant, and is absolute, and dischargeable only by act of God, or the public enemy. (*Id.*)

SPECIFIC PERFORMANCE.

1. Where the plaintiff, being the owner of land, gave the same, by parol, to the defendants, and the use thereof, so long as they, or either of them, should live, and the defendants went into possession of the land, and occupied it, made improvements and paid a portion of the taxes thereon; *Held*, that this was a gift so far executed as to entitle the donees to a specific performance of it by the donor. (*Freeman* agt. *Freeman*, 51 *Barb.*, 306.)

2. *Held, also*, that the acceptance of the land by the defendants as a gift, and their occupancy of it and their improvements upon it, pursuant to the gift, with the approbation of the donor, rendered the gift irrevocable; it being executed by the parties, except that no deed was delivered. (*Id.*

3. *Held, further*, that the gift partook of the nature of a contract, and became binding upon the donor as a contract, by a good and valuable consideration moving from the donees; by their changing their place of residence, and spending several years upon the land when it yielded but very little; and by their making valuable improvements on the land, and paying taxes thereon. (*Id.*)

4. That the donees were, in equity, entitled to a life estate in the premises, and that it would be against conscience to allow the donor to revoke the gift; and that it should be specifically enforced, by a decree directing the execution of a deed by the donor, conveying the premises to the donees, to have and to hold the same so long as they or either of them should live. (*Id.*)

5. When a court of equity sustains a bill, filed to compel the specific performance of a contract for the conveyance of lands, and decrees such conveyance, it is within the proper exercise of its jurisdiction, and according to its settled modern practice, to give full and complete relief, by awarding to the plaintiff, not only the conveyance to which he is entitled, but also the damages which the defendant has caused by his refusal and delay in the performance of his contract, and these may be ascertained by the court in any mode which its discretion approves. (*Worrall* agt. *Munn*, 38 *N. Y.*, 137.)

6. The general rule, that the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, or, if himself in actual occupation of the premises, charged with the value of the use, is not inflexible; and a court of equity will regard the special circumstances of the case, wherever there are any peculiarities which render the rigid application of any general rule unsatisfactory. (*Id.*)

7. The material circumstances of the present case are, that P. contracted to convey to the plaintiff certain lands, but conveyed them instead to the defendant M., who had knowledge of the prior agreement. The plaintiff, in 1844, filed his bill in chancery to compel a specific performance of the agreement, and a decree was entered, requiring P. to convey to the plaintiff, and the plaintiff to pay the purchase price to P., with interest from the date of the agreement; and further directing reference to a master in chancery to ascertain the amount of damages sustained by plaintiff by reason of having been kept out of possession, and by reason of waste committed by the defendant M The purchase-money was paid by plaintiff, according to the decree, and P. executed and tendered a conveyance of the premises, but defendant M. continued in possession pending sundry appeals, until 1859 These appeals related to the question of damages as found and assessed first, by the master and, subsequently by a referee appointed by the supreme

court. It was also a part of the case, appearing in evidence, that the lands were of little value for agricultural purposes, and were purchased by the plaintiff with a view to their value for the manufacture of brick. Out of this state of facts, the court find the following questions to issue:—1. The rule of damages for the delay. 2. The liability of the vendor or occupant, for deterioration, arising from willful waste committed by himself. 3 The time to which damages shall be allowed 4. Whether interest shall be charged on the damages as they arise, until final judgment. (*Id.*)

8. Upon these points it is *Held*,—1. That the general rule, which allows to the vendor the interest on the purchase-money, and, to the purchaser, the rents and profits,—failing here to apply as an equitable remedy, because of the peculiar circumstances of the case, the equitable indemnification of the plaintiff, for being kept out of possession, is found in allowing to him as damages, an anual sum equal to the interest on the purchase-money paid by him. 2. He should be allowed the damages sustained by the deterioration from waste, committed by the defendant. 3. These amounts should be allowed down to the time that plaintiff was let into possession. 4. Upon the damages caused by being kept out of possession, interest should be computed on each annual amount, from the end of each year, down to the time of the assessment or report; and, upon the damages caused by waste, only from the time when plaintiff was let into possession, to the time of the assessment or report of the referee. (*Id.*)

STAMPS.

1. Under section 158 of the Stamp Act of June 30, 1864, the omission to affix a proper stamp does not avoid an instrument unless such omission was with intent to evade the provisions of the act. (*New Haven and Northampton Co.* agt. *Quintard*. *ante*, 29.)

2. Therefore one who seeks to exclude from being given in evidence an instrument by reason of its invalidity in not being properly stamped must show affirmatively that the omission was with the intent to evade the provisions of the act. (*Id.*)

3. But, if the burden of proving the absence of such intent was on the party offering the instrument, still, if it be received by the court under the general objection that the want of a proper stamp renders it invalid, a judgment will not be reversed by reason of such reception. (*Id.*)

4. As the defect arising from the want of a proper stamp could have been remedied by evidence as to the intent of the omission, the objection, to be tenable (in case of reception), must be placed on the ground of the absence of such evidence. (*Id.*)

STATUTE OF FRAUDS.

1. In 1863, the legislature (*Sess. L.* 1863, *Ch.* 464, § 2) amended the *statute of frauds*, so that that section reads as follows: "In the following cases, every agreement shall be void unless such agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith:

2. 1. Every agreement that by its terms is not to be performed within one year from the making thereof. 2. Every special promise to answer for the debt, default or miscarriage of another person. 3. Every agreement, promise or undertaking, made upon consideration of marriage, except a mutual promise to marry:

3. The former statute of which the above is an amendment, had the words, "expressing the consideration," after the words, memorandum thereof, in said second section. *Held*, that the legislature thus changed the statute, with the express intention that the requirement, that the *consideration be expressed* in every agreement should thereafter no longer be insisted on *in any manner*. (*Speyers* agt. *Lambert*, *ante*, 315.)

4. *Held* also, that in the face of this legislative intent sufficiently expressed, the judicial interpretation of the law, as applied in some cases to the law of 1813, in conformity with the English doctrine must cease, as inconsistent therewith and totally repugnant thereto. (*Id.*)

5. Consequently, an agreement as follows: "J. S. Esqr. The house you have rented to A. B. M., I agree to hold myself responsible for the payment of the monthly rent—say 400 per month. Yours respectfully, E. L." *Held* valid, although it might not be considered binding as an original undertaking. (*Id.*)

6. D. wanting work, applied to S. to furnish employment; whereupon it was agreed between them that D. should

cut timber from his own land, and make it into railroad ties for S. and deliver the ties at twelve cents apiece; that S. should furnish money as the work progressed, and the ties were to be his property from the time the trees were cut from the stump. Under this contract the timber for the ties was all cut, and hauled upon the land of a third person, and was there verbally turned out to S. as his property, before being levied on as the property of D. *Held*, that the contract was not within the statute of frauds, but belonged to that other class of contracts where the vendor agrees to furnish materials and manufacture for, and deliver to, the vendee, certain goods at a future day. That in this case the labor was manifestly to be done for S. upon his employment, and the referee, therefore, rightfully held that the timber became the property of S. as soon as it was severed from the stump. (*Stephens* agt. *Sante*, 51 *Barb.*, 532.)

7. The true criterion, in all such cases, is whether the work and labor, required in order to prepare the subject matter of the contract for delivery, is to be done for the vendor himself, or for the vendee. If for the latter, it is simply a case of hireing, and not within the statute of frauds. (*Id.*)

8. Although hop roots, when rooted in the ground, are a part of the real estate of the proprietor of the soil, and will pass to the purchaser, by a conveyance of the land, and to the heir, by inheritance; yet where the plaintiffs agreed by parol to deliver to the defendant a quantity of hop roots, at a future time, at a specified price per bushel; *Held*, that this was not an agreement to sell, or purchase, an interest in real estate, but was an executory contract by the plaintiffs to purchase for, or to sell and deliver to, the defendant an article of merchandise, which, when delivered, would be personal property, and was, therefore, not within the statute of frauds requiring such agreement to be in writing. (*Webster* agt. *Zielly*, 52 *Barb.*, 482.)

9. The statute of frauds does not require the *note* or *memorandum* therein specified to be made and subscribed by the party to be charged, at *the time* of making the agreement. It may be made at any time afterwards, and before the time for its consummation. (*Id.*)

10. A subsequent written recognition of a contract void by the statute of frauds, is not only a ratification of it, but is a sufficient note or memorandum of the contract, within the statute. (*Id.*)

11. The defendant applied to the plaintiffs, to know for what price they would deliver 100 bushels of hop roots, at a railroad depot, and the latter agreed to buy them for the defendant at $6 per bushel; telling them, at the same time, that they should have to pick up the roots from different persons; *Held*, that this amounted to a contract for work and labor to be done and performed, and materials found, and money paid, laid out and expended; being an employment of the plaintiffs to take the job and incur the expense of purchasing the roots for the defendant, with a fixed compensation; and that the statute of frauds had no application to the case. (*Id.*)

12. Payment of a part of the purchase money, on a contract for the sale of personal property exceeding $50 in value, need not be made at the time of making the original contract. If the payment be subsequently made by the one party and accepted by the other, as the consummation of the prior agreement, it brings the case within the spirit and intent of the statute of frauds, and will be considered paying a part of the purchase money at *the time*. (*Id.*)

13. Parties who have made a contract which is void under the statute of frauds may afterwards meet and by such an act as the statute requires, validate and make effectual that which, before, was a void or imperfect contract. And when the minds of the parties meet and concur in consummating the previous void agreement by paying and receiving the money, that is to be deemed the *time* of making the agreement, within the requirement of the statute. (*Id.*)

14. The decision to the contrary in *Bissell* agt. *Balcom*, (40 *Barb.*, 98,) is overruled. (*Id.*)

15. An agreement between a parent and a third person, for the future performances of service for the latter by a minor child of the former, during a period of several years, is void by the statute of frauds, if not in writing. *Jones* agt. *Hay*, 52 *Barb.*, 501.)

16 But if any services are rendered under such a contract, a recovery may be had, for the same, upon a *quantum meruit*, in the absence of any new agreement between the parties, binding upon them, relative to the services of the minor. (*Id.*)

17. And if the original agreement is subsequently terminated by mutual consent, and a new agreement made, by

which all claims of the father, for the services of his son, under the former, are merged in the new agreement. a recovery may be had for the amount stipulated to be paid by the new agreement. *(Id.)*

18. Thus, where, after the making of a parol contract between the parties, for the future services of the plaintiff's minor son for the defendant, and the performance of services thereunder, it was agreed between the parties that if the minor would enlist as a soldier, in the United States service, he should be discharged from further service under the original agreement. and that the defendant would pay the plaintiff $80 (the sum before agreed to be paid) the same as if the son had continued to labor for the defendant for the full term; and the son thereupon enlisted; *Held*, that the new agreement was founded on a good consideration, and was valid and binding on the parties; and it having been performed, on the part of the plaintiff and his son, a recovery could be had, upon it, of the $80. *(Id.)*

19. Where the defense of a suit brought against A. upon a promissory note, is of no benefit to B., he not being liable therein, a request from B. to A. to go on and defend the suit, if it can be considered a contract, is an independent promise on the part of B. to answer for the debt of another, which he is not otherwise liable to pay; and if not in writing, is void, within the statute of frauds. *(Wells* agt. *Mann*, 52 *Barb.*, 263.)

20. To determine whether a contract is within the second clause of section two of the statute of frauds, it must be ascertained whether the party sought to be charged entered into an independent obligation of his own, or whether the responsibility assumed by him was contingent upon the act of another. If the former, the case is outside of the statute, if the latter it is within it. (*Brown* agt. *Weber*, 38 *N. Y.*, 187.)

21. Hence, where W. contracted with H. to build a mill, and H., after erecting the frame, contracted with B. to complete the same, and B., expressing fears to W. of the responsibility of H., was told by W. that he would see that he got his pay, if he finished the mill according to contract; it was *held*, that the promise of W. was within the statute of frauds, being contingent upon the non-fulfillment of the agreement made with B. by H. *(Id.)*

22. The receipt or non-receipt of a consideration by the party promising, does not, in every case, determine whether it is within the statute of frauds or not. *(Id.)*

23. Where property has been sold and delivered, and a part thereof used or appropriated by the vendee, a subsequent agreement between the parties, whereby the vendor agrees to "buy back" the property, is not simply a recission of the original contract, but a new contract or resale. and must be in writing, or accompanied by a delivery, to take it out from the statute of frauds. (*Blanchard* agt. *Tvin*, 38 *N. Y.*, 225.)

24. Where the title of the vendee has not been perfected for any reason, where there has not been a perfect delivery. where fraud has occurred, or where the contract. in any respect remains executory, the idea of a recission is appropriate. *(Id.)*

25. The terms of a written contract, for the sale of goods, may be varied by parol, the original sale furnishing sufficient consideration for the modification. *(Id.)*

26. The case of *Salte* agt. *Field* (5 *D. & E.* 214,) seems to be so far exceptional as not to be an authority outweighing the general tenor of decisions. *(Id.)*

27. A party may renounce a constitutional provision made for his benefit, and, when the law which provides for a transfer of property does not require the consent to be in writing, it may be manifested by parol acts and declarations, so as to effect a transfer of the title to real estate, notwithstanding the statute of frauds. (*Bassen* agt. *Brennan*, 6 *Hill*, 47; *Embury* agt. *Conner*, 3 *Coms.* 511,) (*Sherman* agt. *McKeon*, 38 *N. Y.*, 266.)

28. Where the plaintiff and defendant made a verbal agreement for the sale of cattle, at a price exceeding fifty dollars, without any actual delivery or payment of any part of the price, but the next day the plaintiff called on the defendant for a payment to "bind the bargain so that there will be no chance to back out," and for that purpose the defendant makes a payment of part of the price, the contract is valid and binding within the statute of frauds of this state. (*Bissell* agt. *Balcom*, 39 *N. Y.*, 275.)

29. The requirement that the buyer shall, *at the time*, pay some part of the purchase money, in our statute, is satisfied. *(Id.)*

30. In such case, the sale will be beemed made when the money was paid; for

then the minds of the parties meet in the fact of sale, and a mutual intent is expressed to make it then valid and binding, according to the tenor of the previous oral treaty. (*Id.*)

31. Where a present absolute sale of cattle is verbally made without actual delivery of the cattle to the buyer, but the seller agrees that the cattle may remain on his land, and be taken from time to time by the buyer, as he wants them to butcher, and the buyer gives directions to the seller to remove the cattle to another field for pasture, and he does so, and afterwards the buyer directs another removal, which is also complied with by the seller,—*Quere*—
1. Is not this a sufficient delivery and acceptance of the cattle to satisfy the requirement of the statute of frauds?
2. Is not the possession thereby, in judgment of law, changed, the seller holding the cattle thereafter, not as owner, but as the agent and bailee of the buyer? (*Id.*)

32. The promise of a third person to an attorney in an action for divorce, to pay his fees on condition of his discontinuing the action and a motion for alimony, pursuant to a settlement agreed upon by the parties, is not a promise to answer for the debt, default or miscarriage of another, under the statute of frauds, but is an original undertaking upon which an action will lie. (*Prentice* agt. *Wilkinson*, 5 *Abb. N. S.*, 49.)

33. A delivery of property, to satisfy the requirements of the statute of frauds in respect to oral contracts of sale, must be a delivery by the vendor, with the intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with the intent of taking possession as owner. If the facts do not indicate such mutual intention of the parties, the rule is not satisfied. (*Brond* agt. *Focht*, 5 *Abb. N. S.*, 225.)

34. If the buyer obtains a bill of lading from the seller, without any intention on the part of the seller to deliver it, and insists on retaining possession, against the remonstrance of the seller, he cannot avail himself of it to make out his title. (*Id.*)

STATUTE OF LIMITATIONS.

1. It is not in "furtherance of justice," to allow a party, who has omitted to plead the statute of limitations in bar to a counter-claim, to serve a reply as an amended pleading, in order to avail himself of the statute. (*Clinton* agt. *Eddy*, *ante*, 23.)

2. When a party omits to plead the statute of limitations, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed as having elected to stand upon the other defenses which he made to the demand on the trial, and will not be allowed to abjure such election. (*Id.*)

3. The *statute of limitations* of another state, in which the cause of action arises, is not available as a defense in this state. If six years have not elapsed since the statute of this state began to run the right of action is not barred. (*Townsendon* agt. *Lachenmeyer*, *ante*, 145.)

4. If the statute of limitations was admissible as evidence of a defense here, it could not be proved by *parol*. (*Id.*)

5. The statute of limitations was a bar to the action of plaintiffs, the conveyance of the grant being more than six years prior to the commencement of the action; and, though the instrument of conveyance was under seal, the action not being brought upon the instrument, but upon the promise of the company, expressed or implied, to pay in consideration of the conveyance, the transaction is clearly brought within the statute. (*Coleman* agt. *Second Avenue R. R. Co.*, 38 *N. Y.*, 201.)

STOCK BROKERS.

1. The plaintiffs and the defendant being *stockbrokers* in the city of New York, on the 18th day of February, 1867, entered into an agreement for the sale and purchase of stocks, as follows: "NEW YORK, 18th Feb'y, 1867. (1000 shares.) We have purchased of C. G. White, one thousand (1000) shares of the capital stock of the Hudson R. R., at one hundred and twenty-eight per cent, payable and deliverable seller's option, in this year (1867) with interest at the rate of six per cent per annum; either party having the right to call from time to time, for deposits, to meet the fluctuations of the market" (Signed) Currie, Martin, & Co.:

2. A counter-part of this agreement, for the sale to Currie, Martin & Co., of 1000 shares of said stock, was signed by C. G. White:

3. *Held*, that this is an *executory contract*. The obligation of the vendor to deliver, and that of the buyers to pay, are con-

current conditions in the nature of mutual conditions precedent, and neither party can enforce the contract against the other without showing performance, or offer to perform his own promise according to the conditions of the contract; and as the vendor had the option to deliver at any time, according to his pleasure, between the day of the contract and the 31st day of December, 1867, and the buyers could not be called upon to pay before delivery, it *cannot be considered as an executed contract of sale.* (*Currie* agt. *White*, *ante*, 330.)

4. Consequently, any *cash dividends* declared upon said shares of stock during such period, or any *additional shares* of stock which may be issued by the company during such period, which may enure to the benefit of the stockholders of the company, either by dividends or otherwise, upon such additional shares, or any difference in the price of the shares of such original stock, between the *contract price and their market value*, during such period, all enure entirely to the benefit of the *owner* of the stock—the seller named in the contract, and not to the purchasers therein—the contract remaining executory. (*Id.*)

STOCKHOLDERS.

1. To enable a stockholder in a corporation to maintain an action to restrain the directors from the exercise of their corporate powers, and for the appointment of a receiver, the risk and responsibility must be upon him; so as to afford a guaranty that he is acting for the benefit, or what he believes to be for the benefit, of the company. If it appears that other persons, whose interests are hostile to those of the company, have agreed with the plaintiff to bear and pay the expenses of the litigation, any relief, especially upon an interlocutory motion, will be refused. (*Belmont* agt. *Erie R. R. Co.*, 52 *Barb.*, 637.)

2. Although a stockholder of an incorporated company may have an injunction to restrain illegal acts of the directors, and in certain cases he may have a receiver appointed of a particular fund, the proceeds of an unlawful act; yet where the complaint makes no case for any partial receivership, but, while neither charging insolvency, nor asking to dissolve and wind up the company, prays that "a receiver may be appointed of all and singular the funds and books and papers and rights of action of such company," the court is not authorized to appoint a receiver, the effect of which would be to remove all the directors. (*Id.*)

3. A court of equity has no visitorial power over corporations, except such as may be expressly conferred on it by statute. (*Id.*)

4. An action will not lie in behalf of a stockholder in a corporation, against the corporation and its directors, to remove the directors and appoint a receiver of all the property, rights of action and records of the company, and for an injunction, upon allegations of misconduct in a part of the directors only, in which the others are not charged with participating, except that they are under the influence of the former. (*Id.*)

5. The misconduct of some, or even of all the directors, affords no ground for taking away the rights of the stockholders who constitute the company, either by dissolving the corporation, or taking away its management and placing it in the hands of an officer of the court. (*Id.*)

6. The directors of a railroad corporation, acting in good faith, have power to issue convertible bonds in the name of the corporation, for the amounts they may borrow to complete and finish, or to operate the road, with the right to authorize their conversion into stock; although it increases the amount of capital stock beyond that fixed by the charter. And that being so, the right of the directors to issue stock, in conversion of such bonds, is clear. (*Id.*)

7. If the court were satisfied, however, that bonds were about to be issued, by the directors of a corporation, for the payment of money actually borrowed for the purposes authorized by the charter, but as a part of a fraudulent device to increase the stock, the issuing of them might be restrained by injunction. (*Id.*)

8. So, while the bonds remain in the hands of any persons affected with notice that they do not represent a *bona fide* indebtedness, but were issued with such fraudulent design, the issuing of stock in conversion of them may also be enjoined. (*Id.*)

STREETS AND HIGHWAYS

1. Section 27 of the act of 1813, "to regulate highways," (2 *R. L. p.* 277, *ch.* 33,) adopted in the revision of 1830, (1 *R. S.* 520, § 99,) which provides that

a street must be opened and worked within six years from the time of its being laid out, to make it a highway, has no relation to highways dedicated by the owners themselves to the use of the public, but was intended to apply exclusively to those laid out by the proceedings authorized by the act, in which lands could be taken without the owners consent. (*McManis* agt. *Butler*, 51 *Barb.*, 436.)

2. Where the evidence of a dedication of land by the owners, for a street, consists of clear, unequivocal and decisive acts of such owners, amounting to an explicit manifestation of their will to make a permanent abandonment and dedication of the land, which of themselves are sufficient to establish a dedication, without any intermediate period, if the land dedicated is unequivocally used and occupied for any continuous period of time, by the public at large, that will amount to an adoption of the dedication. But the user, in such a case, ought to be for such a length of time that the public accommodation, and private rights, might be affected by a revocation. (*Id.*)

3. The proprietors of a tract of land caused the same to be surveyed, in December, 1826, and a map thereof to be made, laying out the same into village lots and streets, including certain land designated thereon as Burns street; which map was signed by them and recorded in the county clerk's office, in September, 1827. There was evidence tending to show a continuous use of Burns street as a public highway, from 1832 to 1865. Most of the travel proved was confined to that portion of the street which was necessary for the transit from a street on the east to another on the west side of Burns street, yet for that purpose the line of travel was not directly across the latter street, but it was necessary to turn into that street and go along it a distance of from twenty-five to seventy feet, before turning into either of such other streets. For aught that appeared, Burns street was open its whole length, as mapped, and the testimony tended to show that for some distance it was fenced. In 1853, I, claiming title to the premises, erected a house thereon. Such house did not block up the street, but merely encroached upon it, and the travel went on, as before:

4. *Held* that under these circumstances the jury were justified in finding an *acceptance* of the dedication, by *public user*. (*Id.*)

5. In 1858, the common council of Rochester, in which city Burns street was situated, caused the obstructions that had been placed in the street by I, and those claiming under him to be removed, with their consent, and the street to be improved; since which time it had been used as a street, until the plaintiff put up a fence on it; which the defendants tore down. I was told, when he put up the house, that it was on the street. He admitted that it was, and said that if the street was ever improved, the house would have to be removed; and he set it on blocks, and made no cellar under it. *Held* that the action of the city authorities, in 1858, was a clear *acceptance* of the dedication even if the previous user was not. (*Id.*)

6. *Held, also*, that the question of revocation by I, of the dedication was one of fact, depending on the circumstances of the case; and that the jury were authorized to find, upon the testimony, that his acts were not intended by him as a revocation, and did not amount to it. (*Id.*)

7. *Held, further*, that I, could not revoke the dedication unless he had succeeded to the title of the original proprietors. (*Id.*)

8. Where the grantee in a quit-claim deed acquires, thereby, only an undivided portion of the interests of the original proprietors in land previously dedicated as a street, and his deed refers to the map on which such land was so dedicated, it may well be questioned whether the grant to him is of anything more than the fee subject to the public easement. *Per* J. C. SMITH, J. (*Id.*)

9. Whether an owner of an undivided portion of the estate can revoke a dedication made by the owners of the whole, prior to the grant to him. *Quere.* (*Id.*)

10. The decision in *Snyder* agt. *Plass*, (28 *N. Y.*, 465,) is conclusive and controlling in this case, upon the main issue, to wit: that an order directing a new road, a part of which was over the bed of an old road, is not void because the portion over the old road was to be but two rods wide; nor because the line of one survey extended into an orchard, where it was not shown that the trees came within the survey, or that the owner would be deprived of their use and enjoyment by the opening of the proposed highway. It seems that an order laying out a new road may be void, so far as relates to a portion of the route, without vitiating the whole order. (*Snyder* agt. *Trumpbour*, 38 *N. Y.*, 355.)

11. Upon the points in reference to which a distinction between this case and that of *Snyder* agt. *Plass*, was sought to be made, it was *held*,—

12. That the fact, that the road passed through improved lands, other than those mentioned as such in the application, does not establish a variance sufficient to render the proceedings void on that account. (*Id.*)

13. Also, that, notice having been given to the occupants of the land, it was not vitiated because it erroneously stated that some of the improved lands were unimproved. (*Id.*)

SUMMARY PROCEEDINGS.

1. A *landlord* is not entitled to an *injunction* to restrain *summary proceedings* instituted against his tenants, by another person claiming to be the owner of the lease of the same premises, where the landlord is not made a party to such summary proceedings. (*Marry* agt. *James*, *ante*, 52.)

2. And it does not make the case any stronger for the landlord that he requires the testimony of the city judge, before whom the summary proceedings are pending, as a witness; where the principal object of such testimony appears to be to contradict or shake the credibility of a party prosecuting the summary proceedings by the production of certain affidavits of such party, filed with the city judge in a former proceeding. (*Id.*)

3. The *City Judge* of New York has equal jurisdiction with the Recorder of summary proceedings to recover the possession of land. (*Id.*)

4. The interposition of a court of equity to restrain *summary proceedings* has never been invoked except by a tenant or other *party to the proceedings*, and then only on the ground of fraud or surprise, or of some equitable title that could not be set up at law. (*Aaron* agt. *Baum*, *ante*, 237.)

A stranger, that is, not a party to the proceedings, cannot obtain an injunction upon the allegation merely, that he is in danger of having his *possession disturbed*. (*This agrees with Marry* agt. *James*, *ante*, p. 52.) (*Id.*)

6. In summary proceedings, under the statute, to recover possession of land, it is the duty of the landlord to make out a case, and if he fails so to do, the court can not help him out by reading his affidavit otherwise than he has himself made it. (*The People* agt. *Mathews*, 38 *N. Y.*, 451.)

7. The affiant in such proceedings must not only *intend* to swear to the facts necessary under the statute to make a case, but the facts must be so stated that there can be no doubt he *does* so swear to them. If they are so stated as to admit of two different constructions, upon neither of which he could be convicted of perjury, because he may allege that the other was what he swore to, the affidavit is insufficient to support the proceedings. (*Id.*)

8. The *certiorari* authorized by statute to bring up for review the summary proceedings instituted before a justice of the peace, to remove from the premises a tenant, holding over his term, requires the court to review any question of law arising either in the proceedings or upon the trial; also all questions of law arising upon the rulings of the court as to the challenge of jurors, or the admissibility of evidence or charge to the jury. (*The People* agt. *Hamilton*, 39 *N. Y.*, 107)

9. Such proceeding to remove a tenant holding over his term is not a civil action within the meaning of the Code. (*Id.*)

10. In such proceedings, the law does not authorize either party peremptorily to challenge a juror. (*Id.*)

SUMMONS.

1. Where the complaint alleged a cause of action for a certain quantity of hay sold, at an agreed price per ton; also for a balance due—specifying the sum, for personal property sold; also for moneys paid out for the benefit of the defendant, and at his request, in a specified sum; also for work, labor and services done and performed for the defendant, for which defendant agreed to pay as much as they were reasonably worth, that said services were reasonably worth a specified sum:

Held, the *summons* being issued under the 2d subdivision of § 129 of the Code for relief, that the *complaint be dismissed with costs*, for the reason that it disagreed with the summons. With the privilege to the plaintiff, on payment of said costs to amend his summons. (*Champlin* agt. *Deitz*, *ante*, 214.)

2. Where a *summons* contains a notice under the *first* subdivision of § 129 of

the Code, and is served *before* the complaint; and the complaint sets out a cause of action under the *second* subdivision of that section, it is such an irregularity as to require the court to *set aside the complaint*, on motion of the defendant; and it is pretty well settled that such an irregularity is not cured or waived by a *general appearance* in the action. (*Brown* agt. *Eaton*. *ante*, 325.)

3. But it has been doubted whether the same rule will be applied when the notice in the summons is under the *second* subdivision, and the cause of action in the complaint authorizes judgment without such application under the *first* subdivision of § 129. (*See Henson* agt. *Decker*, 29 *How.*, 385.) (*Id.*)

4. Where the summons and complaint *are served at the same time*, no motion to set aside either, ought to prevail, on the ground, merely, that the summons contains a notice under the *second* subdivision of § 129, and the complaint states a cause of action under the *first* subdivision; for the reason that in such case the complaint alone furnishes the cause or ground of action, and is the only foundation upon which the action can proceed. (*Id.*)

SUBROGATION.

1. Where a conveyance of land is made, subject to a prior mortgage thereon, given by the grantor, the premises are the primary fund for the payment of the mortgage, and thenceforth, as between the grantor and the grantee, and those claiming under the latter, the grantor stands as a mere surety for the payment of the bond debt; and, upon being compelled to pay the same, has a right to be subrogated to the position of the holder of the mortgage, in order that he may resort to a sale of the premises to effect his own indemnity. (*Johnson* agt. *Zink*, 52 *Barb.*, 396.)

2. And if the holder of the bond and mortgage refuses to accept a tender of the amount due thereon, with costs, and to assign the securities to a third person, for the benefit of the mortgagor, and attempts to enforce the payment of the bond, by suit, he may be ordered to assign the bond and mortgage to such third person, on receiving the amount due thereon, with the costs accrued in the action, on the bond, and be forever restrained from prosecuting such action. (*Id.*)

SUPPLEMENTARY PROCEEDINGS

1. An *order* of the court made for the *punishment* of a party for not answering in *proceedings supplementary to execution* is appealable. (*Forbes* agt. *Willard*. *ante*, 193.)

2. Where a witness or party, in supplementary proceedings, declines to answer questions propounded to him, on the ground that his answers will have a tendency to *criminate* him; it is the province of the court to determine whether that *will probably be the effect of the answers*, if they are required to be given. And when it is fairly ascertained that such will not be the effect of the answers, he should be required to answer the questions put to him. (*Id.*)

3. The provisions of the Code were intended to give the creditor complete authority for a full and searching examination of the judgment debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor had made, or attempted to make, of his property. And by an express provision its enactments are not to be strictly construed. (*Id.*

4. The object plainly intended by the amendment in 1863, to section 292, was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatever, on account of the *purposes* for which he might have disposed of it. (*Id.*)

5. It could not have been intended to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him. But to include within it, all conveyances, assignments and transfers whatsoever, which the debtor may in any manner have made of his property, whether by written conveyance, assignment or transfer, or by *transfers* which should prove to be made by actual delivery, following or accompanying an agreement by *parol*. (*Id.*)

6. Therefore, the debtor may properly be required to answer fully, concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise, notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it, and without any qualification or restriction arising out of the nature and character of such crime. (*Id.*)

Digest.

7. Where the inquiries made of the debtor, have reference to the *source* from which, and the *means* by which he may have acquired his property; in discovering these facts, the debtor may be compelled, if he is required to answer, to give evidence tending to show that he has been guilty of a criminal offense different from those falling within the protection of the amendment of 1863. (*Id.*)

8. This he could not be required to do, unless the case is brought within the fifth part of § 292 of the Code, which is limited to commissions of *fraud*. For the rule of the common law is well established, that no person, whether a witness or a party, shall be compelled to answer, when examined on oath as such, in a judicial proceeding, where the effect of his answer would expose him to a prosecution for a crime. (*Id.*)

9. The provisions of the Code under said amendment that "no person shall on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud," is not to be restricted simply to a fraud in the disposition of the debtors property, but to *any fraud* whatsoever. (*Id.*)

Held in this case, that the questions were pertinent to the inquiry the creditor was authorized to make—having reference to commissions of fraud by the debtor, and he was required to answer. (*Id.*)

10. The *first order*, in supplementary proceedings, appointing a referee, &c., *must be finished* or some order made by the court in the proceeding, before any other order can be made in the premises. (*Brockway* agt. *Brien*. *ante*, 270.)

11. An application for the appointment of a *receiver in supplementary proceedings*, must be made to the judge who granted the order of reference, and appointed the referee. (*Ball* agt. *Gooden-augh*, *ante*, 479.)

12. The order should be a chamber order and filed with the clerk of the city and county of New York; and it is only from the time the receiver receives a copy of the order, certified by the county clerk that he has any power to act at all. (*Id.*)

13. The judge in such an order has no authority to direct an assignment of personal property, and can only forbid the transfer of debts owning to the judgment debtor, until the receiver can sue (*Id.*)

14. Where in a creditor's bill filed to compel the application of choses in action, equitable interests, &c., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance of a farm to H., and H. being made a party, it is claimed that the deed should be set aside, and it appeared that the conveyance was made in good faith, but that H. gave to A. a mortgage thereon, which is unpaid, it is competent for the court to decree that H. pay such mortgage to the receiver, to be applied on the judgment, although such mortgage was not named in the bill, nor in the prayer for relief. (*Durand* agt. *Hankerson*, 39 *N. Y.*, 287.)

15. In such case, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and evidence tended to show an assignment by A. to him; still, it being proved and found that such assignment was fraudulent, it was proper to require H. to pay the mortgage to the receiver. (*Id.*)

16. The objection that such third person should have been made a party, and that H. may hereafter be called upon to pay the mortgage to him, is waived by H. if he does not make it by answer or demurrer. And if, by reason of the omission of any notice of such mortgage in the bill, H. was left in ignorance that any claim to such mortgage would be made, and he was there surprised, he should have sought relief in the court below, who would, no doubt, have allowed him to amend his answer. (*Id.*)

17. A debtor who, after the service of the usual order in supplementary proceedings, enjoining him from disposing of his property, draws out money previously deposited in bank, under an account opened in his name "in trust," and applies a part of such moneys to his own use, or that of his family, is liable to be punished as for contempt therefor. (*People ex rel. Noel* agt. *Kingsland*, 5 *Abb., N. S.*, 90.)

18. He cannot avoid such punishment by urging that he was doing business as agent for his wife, and that the funds were held by him in trust for her. The legal title, nevertheless, under such a deposit in his own name "in trust" was in himself (*Id.*)

19. Where the amount withdrawn was $356,—*Held*, that a fine of $400 was not unreasonable to indemnify the creditor. (*Id.*)

TAXES.

1. A resident of this state is not liable to be assessed and taxed here, for his capital invested in loans in other states upon securities taken and held in those states by his agents. (*The People* agt. *Gardner*, 51 *Barb.*, 352.)

2. Whether the owner of property thus situated is liable to be assessed here, for it, depends upon the question whether it can be properly and legally held to be within this state, at the time of the assessment. As such property has no actual location or *situs* within this state, notwithstanding the owner resides here, it is not subject to taxation. (*Id.*)

3. Where a railroad company, under the permission given by the act of the legislature of 1836, chapter 316, contracts with the chiefs of a nation of Indians, for the right to construct its road upon the land of such Indians; the contract giving the company the right to make and use its road upon such land, without any limitation of time as to the enjoyment of the right; although the fee of the land is not vested in the company—that being prohibited by the statute—yet such land is "owned" by the company, within the contemplation of the section of the Revised Statutes touching taxation, (1 *R. S.* 387, § 1,) and it is liable to be assessed as property occupied by the company, as a railroad, in the town in which it is situated. (*The People* agt. *Beardsley*, 52 *Barb.*, 105.)

4. All real estate owned, possessed or appropriated for use by railroad companies is to be assessed. (*Id.*)

5. It was not intended, by the act "to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservation," passed February 19, 1857, to effect any of the provisions of the general law respecting the property liable to taxation. (*Id.*)

6. The tax is not to be assessed or imposed on the reservations, or any part of them, for any purpose, so long as the reservations remain the property of the Seneca nation. But when the Indians enter into a contract with a railroad company, by which they give the latter the right to construct its road upon their land, and the road has been constructed thereon, and is used and occupied by the company, it ceases to be the property of the Seneca nation, to the extent specified in the contract. Although the fee of the land does not pass to the company, the possession and use and the right to possess and use, pass by such contract. (*Id.*)

7. A village tax collector, having a tax warrant in due form of law made out against the tax payers of the village, among whom are various stockholders in a bank, some of whom refuse to pay their taxes, and others direct him to call at the bank and receive their taxes, has no right to take from a drawer in the bank, without the consent of the officers, sufficient money to pay the taxes of such stockholders; even though each person named as a stockholder on the assessment roll and tax warrant may have left with the bank dividends unpaid sufficient to pay his taxes. (*First National Bank of Sandy Hill* agt. *Fancher*, 52 *Barb.*, 138.)

8. As against corporations, the rule of taxation is just, when based upon the amount of capital paid in, or secured to be paid in, after deducting therefrom the amount of such capital actually paid out for real estate; assessing the remaining capital at its actual value, and leaving the real estate to be assessed upon individuals in the town or ward where it is situated. (*The People* agt. *Board of Assessors*, 39 *N. Y.*, 81.)

9. Such is the scheme and mode of taxing the property of corporations, prescribed by the statute of this state. (*Id.*)

10. The mains of a gas company, under the streets of the city, cannot be regarded as real estate under the statute, for purposes of taxation. (*Id.*)

TENANCY BY CURTESY.

1. The estate of tenancy by the curtesy still exists in this state, notwithstanding the statutes of 1848 and 1849, known as the Married Woman's Acts. (*Burke* agt. *Valentine*, 5 *Abb. N. S.*, 164.)

2. Those statutes have not interfered with the right of the husband to the personal estate, or the estate by curtesy, in the real property of the wife, after her death, if not disposed of by her, either during life, or by will to take effect at her death. (*Id.*)

TENDER.

1. A tender of performance may be accompanied with such conditions as were, by the terms of the contract between the parties, conditions precedent to be performed by the party to whom

the tender is made. (*Wheelock* agt. *Tanner*, 39 *N. Y.*, 481.)

2. Where a payment was to be made by the delivery of wagons, and the wagons were ready for delivery at the time and place stipulated, and were not actually delivered, because the party was not then ready to receive them, and were kept by his request, until he was ready, &c.,—*held*, that a further tender of the wagons was unnecessary, and that, from and after the time when the wagons were ready to be delivered according to the terms of the contract, no further interest could be charged on the debt to be thus paid. (*Id.*)

TITLE.

1. Where a person erects a *building* upon the land of another, without any agreement or understanding whatever with the owner of the land; such building thereafter becomes real and not personal estate; and by a conveyance of the land by the owner, the title and right of possession to the building vests in the grantee of the land, although the building is claimed by a third person, who claims to have purchased it in good faith from a person not the owner of the land. (*Ritchmeyer* agt. *Morse*, *ante*, 388.)

2. The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences—*per* BRONSON, J., *Mott* agt. *Palmer* (1 *Comst.*, 564). (*Id.*)

3. The equities of a party who takes negotiable paper before maturity, in good faith, and pays for it, or pays part of the consideration therefor, by the surrender and extinguishment of the note or other security for a debt due to him from the assignor or previous holder of the paper transferred, are superior to those of the original maker or indorser of such paper. (*Bromley* agt. *Walker*, 51 *Barb.*, 203.)

4. Thus where V., the payee and indorser of a promissory note for $200, made by the defendant, sold and delivered the same, before maturity, to G. for $100 in cash, and his own note for $100, held by G. for a previous indebtedness, at the same time giving his note for the interest on the note so surrendered, and G. taking such note made by the defendant in good faith and without notice; *Held*, that these facts brought the case within the decisions in *Stettheimer* agt. *Meyer*, (33 *Barb.*, 216.) and *Brown' Ex'r, &c.*, agt. *Leavitt*, (31 *N. Y.*, 113,) and within the principle declared in *Young* agt. *Lee*, (2 *Kern.*, 554); and that G. was a *bona fide* holder of the note so purchased by him. (*Id.*)

5. By a judgment in partition, lot No. 2, of the premises partitioned, was set off and assigned to the plaintiff by its number, and by metes and bounds, by which it was bounded south by lot No. 3, which was assigned to McB. under whom the defendant claimed. These lots were both designated on a map or allotment of great lot No. 9, known as the third allotment. In such judgment reference was had to this map and allotment, but the judgment did not assume to divide any of the lots, or to change the original lines thereof, the measurements and descriptions therein being simply designed to give the boundaries of the lots according to the original lines of such lots upon the said third allotment. The surveyor, in describing and in running the lines of lot No. 2, made a mistake in respect to the southern boundary, by which he apparently added a strip of land, the whole length of said lot, of about fourteen rods in width, to lot No. 3, and diminished the size of lot No. 2 to that extent.

6. *Held*, That the plaintiff was entitled to the whole of lot No. 2, and had title to it; and that this error of the surveyor did not affect such title. (*Townsend* agt. *Hayt*, 51 *Barb.*, 334.)

7. That it was clearly the intention of the commissioners to assign the plaintiff, in the partition, the whole of lot No. 2, as the same was known and designated on the original map of the third allotment of great lot No. 9; and the mistake of the commissioners was a mere misdescription of the boundaries of said lot, and not an assignment of the particular parcel of land independent of its original lines and its true boundary. (*Id.*)

8. That although, if possession had been taken of lot No. 3, and it had been fenced, used and occupied up to the erroneous line, and such adverse use had been acquiesced in, or such line recognized as the true line, for the period of twenty years, it would have become the legal, fixed and boundary line of division between lots Nos. 2 and 3, by force of the statute, yet as the erroneous line ran through wild land, with no clearing, improvement or fence on either side of it, and there was no question of adverse possession, the location of the line as made by the survey had about it none of the elements of a line located by the parties in *pais*, where

rights have been acquired upon the assumption that it is the true line (*Id.*)

9. That it was a case of *mutual mistake*, the commissioners being the agents of both parties, and the plaintiff having done nothing to estop her from asserting her right to hold the whole of lot No. 2, to the extent of the true southern boundary. (*Id.*)

10. That McB. and the defendant claiming under him, could not hold the strip of land belonging to lot No. 2, it being confessedly not a part of lot No. 3, and they never having been in possession of it, or exercising any rights of possession over it calling upon the plaintiff to assert her rights in respect to the disputed territory. (*Id.*)

11. Accordingly *held* that an action would lie by the plaintiff against the defendant for trespass, in cutting timber upon the disputed territory. (*Id.*)

12. R. and T. being adjoining owners of land, T. called upon R. in reference to building a line fence. R. being a cripple, unable to leave his house, and not knowing where the boundary line between them was, sent T. to B. to have the latter point out the line, saying that B. knew where the lane was. B. accordingly pointed out the line to T. who built a fence there, and from year to year improved his land up to the fence. The evidence showed that R. never knew where the line had been pointed out or located, nor what T. had done in the way of fencing and improving the land. It turned out that B. did not know where the line in fact was, and pointed out the wrong line. *Held* that upon these facts the elements necessary to create an *estoppel in pais* were entirely wanting. (*Raynor* agt. *Timerson*, 52 *Barb.*, 517.)

13. *Held, also*, that T. was as much bound as R. to know where the true line was, between the two lots, and that B. was as much the agent of T. as of R. (*Id.*)

14. *Held, further*, that as it did not appear from the case that there was any difficulty in ascertaining the true line, by survey and measurement, it was not a case where the line was uncertain, and difficult to discover, but a case where T., instead of taking any steps to ascertain, chose to take the word of B., and thus, by the mistake of the latter, an erroneous line was located and the division fence built upon it. (*Id.*)

15. That R. not knowing where the location was made, nor that T. was making improvements upon the land on his side of the line fence, he was not called upon to speak, or to give notice; and his silence, under the circumstances, implied no acquiesence in T.'s proceedings and no wrong. (*Id.*)

16. There is no case to be found where an erroneous boundary line, established under such circumstances, has been held binding and conclusive on the ground of estoppel *in pais*, short of twenty years' possession under claim of title (*Id.*)

17. The mere circumstance that one has made improvements upon the land of another, under an honest but erroneous belief that he was the owner, forms no ground for transferring the title of one person to another; nor for estopping the owner from reclaiming his own. (*Id.*)

18. Possession and claim of title under an erroneous location, short of twenty years, is not sufficient to establish title in the occupant, as against a valid paper title; unless such location was made, and the possession under it has been continued, under such circumstaces as to estop the party having the paper title from asserting his claim against such occupant. (*Id*)

19. An exception to a single word, in a sentence of the judge's charge, which has no bearing upon any issue, or question in the case, will not be allowed or entertained. (*Id.*)

20. Where it is proved, in an action of ejectment brought by the people, that an individual under whom the defendfendant claims title, was not an alien, but a naturalized citizen, both at the time of the grant to him and of his grant to the defendant's grantor, the people, in their sovereign capacity, should be presumed to have known that fact; especially where it appears that such person had represented, and exercised, their sovereignty, both in the legislative and judicial departments of the government for a number of years. (*The People* agt. *Snyder*, 51 *Barb.* 589.)

21. The treaty between the United States and the government of great Britain, commonly known as Jay's treaty, concluded and ratified by our government in 1794, expressly provided that British subjects, then holding lands in the United States, should continue to hold them according to the nature and tenure of their respective estates and titles in such lands, and might grant, sell or devise the same, as they might respectively choose to do. When this treaty was ratified, it became a part of the supreme law of the land, and rend-

ered the title of every alien British subject, to lands in every part of the United States, then held, not only valid, but alienable by him, the same as though he had been a native born or naturalized citizen. *(Id.)*

22. The act of the legislature of this state, passed April 20, 1798, expressly authorized the conveyance of land to aliens, and made conveyances to them valid to vest the estate thereby granted, in such alien, "to have and to hold the same to his, her or their heir heirs and assigns forever, any plea of alienism to the contrary notwithstanding." (4 *N. Y., Stat. at Large*, 294.) *(Id.)*

23. Under this statute Sir William Pulteney, who was an alien, took and held a perfectly valid title to all the lands embraced in the deed to him from Charles Williamson and wife, dated March 31, 1801; he having complied, fully, with the conditions prescribed in the second section of the aforesaid act, and had his conveyance recorded, in the office of the secretary of state, within twelve months after the date thereof. *(Id.)*

24. The complete and perfect validity of the title, in Sir William Pulteney, has been often affirmed by the courts of this state; and the whole question having been carefully examined, and the validity of the title distinctly affirmed, in the case of *The Duke of Cumberland* agt. *Graves*, (7 *N. Y. R.*, 305,) that decision, by the court of last resort, ought to pbt the question of the validity of such title at rest, forever. *(Id.)*

25. Where, in an action of ejectment brought by the people, it was admitted by the pleadings that a third person held the title of the premises, in 1792, and that consequently it was then out of the plaintiffs, if they had ever been invested with it, *Held* that the mere fact that the lands in question were at the time of commencing the action unoccupied and uncultivated, raised no presumption whatever that the plaintiffs had become re-invested with such title. *(Id.)*

26. The presumption in such a case is, that the title remains out of the plaintiffs, until the contrary is shown, affirmatively. The burden of proving reinvestment is on the plaintiffs. The fact that the land is wild, and not actually occupied by any one, works no forfeiture of title, and no escheat. Nor does it raise any presumption in the people's favor, where they are shown to have been once divested. *(Id.)*

27. In an action of ejectment, brought by the people, the plaintiffs cannot recover upon the ground that the Indian title to the lands in question has never been extinguished; where it is not pretended that the state has ever acquired the Indian title, by any purchase or treaty, but on the contrary, it is claimed that the fee of such lands is still in the Six Nations of Indians. *(Id.)*

28. Although a rent charge cannot be apportioned by the act of the parties, it may be by force of the law. The descent of lands from ancestor to heirs is a transfer of title by operation of law. The heirs take and hold such inheritance as tenants in common. Each of such tenants may pursue his remedies independent of the other. (*Cruger* agt. *McClaughry*, 51 *Barb.*, 642.)

29. The owner of lands conveyed the same to the defendant's grantor, subject to an anual rent charge thereon, and the right of re-entry in case of non-payment of rent. The grantor died, leaving six heirs. *Held* that one of such heirs could maintain an action of ejectment, to recover possession of her one sixth of the lands, as such heir, for non-payment of rent, without joining the owners of the other five sixths as plaintiffs. *(Id.)*

30. A contingent remainder is not subject to levy and sale on execution. The statute is not broad enough to include future estates in expectancy among those estates or interests in land which may be sold on execution. (*Jackson* agt. *Middleton*, 52 *Barb.*, 9.)

31. To authorize the presumption of a grant, "the enjoyment of the easement must be not only uninterrupted for the period of twenty years, but it must be adverse, *not by leave or favor*, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner." (*Parker* agt. *Foote*, 29 *Wend.*, 313.) (*Flora* agt. *Carbeau*, 38 *N. Y.*, 111.)

32. It is well established, that, under a mere covenant in a deed, providing against certain construotions, which may be noxious or offensive to neighboring inhabitants, those who have suffered from a breach of the covenant, though not parties to the deed, will be afforded relief in equity. As the covenant is intended for their benefit, it will be deemed to have given them an easement in the land, and a court of equity will interpose to give them relief, by injunction against its infraction. (*Gibert* agt. *Peteler*, 38 *N. Y.*, 165.)

33. Where a deed contains a covenant, to

the effect, that the grantee will not erect, nor suffer to be erected, any structure, whereby the view or prospect of G. (not a party to the deed) shall be obstructed, and, in case of breach, the premises to be forfeited to the grantor, for the use of G., his heirs and assigns; *held*, that the language is as positive as could be employed to make the land described, an estate upon condition, and it is not the less valid, because the thing prohibited is declared to be for the protection or convenience of a person occupying adjoining land. (*Id.*)

34. Hence, where a subsequent owner of lands so conveyed, agrees with another to convey the same to him with clear title, the grantor is not bound to accept a title incumbered with the above restrictions. (*Id.*)

35. The vendees were in possession, under a contract from the vendor to convey, and made improvements in accordance with the contract, which required a certain expenditure, as necessary condition to entitle them to a deed. The vendor failed to convey, by reason of defective title in himself. *Held*, that the vendees had an equitable lien on the premises, for the money expended in improvements thereon, (*Id.*)

36. Where parties contract to purchase an entire property, and the title to a part of the same is found defective, they cannot be compelled to take that portion only to which the title can be made good, even though proportionate compensation were allowed for the part in respect to which the title is found to be defective. (*Id.*)

37. Where the conveyance, under which a party holds, refers to a deed of the same premises, which contains a restrictive clause, and which is on record, it will be presumed that he has notice of the restrictive covenant. (*Id.*)

38. Undisputed title in O., to certain premises, corner of G. and B. streets, in New York city, adjoining those in controversy, which latter, at the time of conveyance to him, were a part of G. street; hence, title in O. to the middle of G. street, and covering the premises in question. (*Sherman* agt. *McKeon*, 38 *N. Y.*, 266.)

39. Plaintiff claimed title under sheriff's deed of sale, on executions against O., recorded in 1853, and conveying all O's right, title and interest in said premises in 1829 or thereafter; also quitclaim from O., in 1850. (*Id.*)

40. Evidence also given, that O. inclosed said premises in 1838, and continued in possession until 1848. (*Id.*)

41. Defendant claimed right of possession as lessee of one H., whose claim of title rested on the following evidence: First, deed from O. to R., in 1839, conveying the premises as conveyed to him in 1827, except, that the northerly line is described as "northerly by the *late* line of Grove street," instead, as in the conveyance to him, of "northerly by Grove street;" second, foreclosure of mortgage given by O., in 1835, and deed of master in chancery, under such foreclosure, given, in 1847, to one D., of lot bounded by old line of Grove street,—also deed from said D. of same lot, in 1848, to H., lessor of defendant; third, proceedings by mayor and commonalty of New York in 1836, confirmed in 1837, widening Grove street, on the side opposite the premises of O., and the closing and vesting in the city of a portion of Grove street, including the premises in question, and an award to O. of $1,500, as damages for such conversion. This evidence was offered by plaintiff; fourth, deed from corporation of New York to said H., in 1847, of the premises in question. It further appeared in evidence, that defendant took possession of the premises as lessee of H., under the said deed from the corporation, and erected a building thereon. The precise question to be determined was, whether O. became divested of title in the premises, covered, before 1837, by Grove street, prior to the sale and conveyance by the sheriff of said premises in 1853. Upon this point it was *held*,—1. That neither by the deed from O. to R., in 1838, nor by that of the master, in 1847, was O.'s title in the premises in question divested; as both these deeds, by their description, excluded these premises which were north of the northerly boundary defined in each of these conveyances. 2. That, by the proceedings of the mayor and commonalty, confirmed in 1837, widening Grove street on the northerly side, and closing a portion thereof on the southerly side, including the premises in question, to the use of the corporation, and for which an award was made and accepted by O., the latter was divested of his title therein, which thereupon vested in the corporation. (*Id.*)

42. *Hence*, the title of H., derived from the corporation, and under which defendant claimed as lessee, was good. (*Id.*)

43. The doubt as to the divestiture of O.'s

title in the premises covered by the street, where that part of the street covering those premises was closed under the proceedings referred to, seems to have been occasioned by the confusion and obscurity in the report, or original and amended reports, of the commissioners appointed to make the estimate and assessment in the Grove Street improvement. In the construction of these reports, to give them effect, it was *held*,

44. That their language must be interpreted, in view of the facts elicited, and the circumstances surrounding the case. *(Id.)*

45. The receipt of the money by O. was an expression of consent to the taking of the property by the city, and estopped him, and those claiming title under him, from alleging an unconstitutional taking of private property for public purposes. *(Id.)*

46. A party may renounce a constitutional provision made for his benefit, and, when the law which provides for a transfer of property does not require the consent to be in writing, it may be manifested by parol acts and declarations, so as to effect a transfer of the title to real estate, notwithstanding the statute of frauds. (*Bassen* agt. *Brennan*, 6 *Hill*, 47; *Embury* agt. *Conner*, 3 *Coms.* 511,) *(Id.)*

47. The fact that O. took possession of the premises (in 1838), and held it for some time, so far as it shows a claim of title is met by the subsequent surrender to a party claiming under the corporation deed. *(Id.)*

48. Where the description in a deed defines the boundary of the premises along the line of a given street, title vests in grantee to the middle of the street, subject, of course, to the public use of the same as a highway. *(Id.)*

49. Where a proceeding is void upon its face, or where, to show title, evidence must be produced, which will show the proceedings void, such proceedings are no cloud upon the title to the land. But where such proceedings are *prima facie* evidence of title, a bill *quia timet* will lie to remove such cloud. (*Allen* agt. *City of Buffalo*, 39 *N. Y.*, 386.)

50. Where an assessment upon property is improperly or irregularly made, and where a certificate of sale of property, under such assessment, is made *prima facie* evidence of title, such certificate of sale becomes a cloud upon the title, and an action *quia timet* will lie to remove it. *(Id.)*

TRADE MARK.

1. A manufacturer cannot acquire a special property in an ordinary term or expression, as his trademark, the use of which as an entirety is essential to the correct and truthful designation of the particular article or compound. (*Town* agt. *Stetson*, 5 *Abb. N. S.*, 218.)

2. Thus a dealer in salt fish cannot maintain an exclusive claim to the use of the term "dessicated codfish" as a trademark. It is only by the prefix of some other word, not previously applied in that connection, and not essential to the truthful designation of the article produced, that he can be protected in its exclusive use. *(Id.)*

TRESPASS.

1. Where defendants indemnify the sheriff and direct him to go on and sell property in possession of and claimed by the plaintiff as owner, he being in fact the owner, they will be held liable as original trespassers, notwithstanding the proceeds of the sale was applied to an execution levied prior to that of the defendants. (*Weber* agt. *Ferris*, *ante*, 102.)

TRIAL.

1. Where the defendant has the *affirmative of all the issues*, he has the right to the *opening and closing argument* to the jury. (*Hoxie* agt. *Green*, *ante*, 97.)

2. So *held* on the trial of an action upon a promissory note which was transferred to the plaintiff by the payee when past due, and the defendant set up as a defense in his answer; 1st that the note was given without consideration. 2d that it was given under duress by threats of criminal prosecution and of personal injury, and injury to the property of defendant by the payee and his wife. 3d that the note was transferred to the plaintiff after it became due; and 4th that the plaintiff was not the party in interest nor the owner of the note. *(Id.)*

3. Where there is no conflict of evidence, and the facts are undisputed, it is for the court to declare the law upon them; and if it is of the opinion that the plaintiff has failed to establish a cause of action, it is not erroneous to order the complaint to be dismissed, without submitting the case to the jury. (*Redpath* agt. *Vaughn*, 52 *Barb.*, 489.)

4. This case generally is an apt illustra-

tion of the complications that may arise from an effort to *prove too much;* that is, more than enough to substantiate the allegations in the complaint. (*Paige* agt. *Willet*, 38 *N. Y.*, 28.)

5. The following points are incidentally brought to view in the opinions:

6. A defendant is not at liberty to raise an issue which he has closed by admissions in his answer, or stated in another form. (*Id.*)

7. A defendant who explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be permitted to deny its existence, or to prove any state of facts inconsistent with that admission. (*Id*)

8. General exceptions to the charge of the judge are unavailable upon appeal. (*Id.*)

9. It is the common experience to apprise the jury of the effect of their verdict upon the parties in respect to the question of costs, and the practice has been expressly and repeatedly affirmed. (*Waffle* agt. *Dillenback*, 38 *N. Y.*, 53.)

10. Where testimony tending to establish a material fact, although incompetent in its nature, is received without objection, or, being objected to, is received notwithstanding the objection, the party has a right to insist upon the facts shown thereby. (*Flora* agt. *Carbean*, 38 *N. Y.*, 111)

11. A party cannot at the trial assume as uncontradicted, facts which are in question upon the evidence, and ask the court to rule upon the same, as a matter of law. In such case, the party should request the court to charge the law as he supposes it to be, if the jury shall find the facts to be as claimed by him. (*Le Roy* agt. *Park Fire Ins. Co.*, 39 *N. Y.*, 56.)

12. *It seems*, that there is no rule of practice or propriety, which forbids a judge from stating to the jury, the impressions which testimony, either as to the subject-matter, or as to the manner of its delivery, makes upon his mind, leaving the jury to draw their own conclusions. (*Wiase* agt. *McDonald*, 39 *N. Y.*, 233.)

TROVER AND CONVERSION.

1. In an action of *trover* for the conversion of grain, the plaintiff is entitled to recover, as damages, the *highest market value* of the property at any time intermediate the conversion and the trial. (*Loddell* agt. *Stowell*, *ante*, 88.)

2. Where personal property, severable in its nature, as grain, is owned by *tenants in common*, and one of them appropriates the whole to his own use, and shows clearly a determination to deprive the other co-tenant of any portion of the common property, by locking up the same in his barn, and refusing to deliver to, or allow him to take any portion of it, an action of *trover* can be sustained for a conversion of the property. (*Id.*)

3. It is now well settled that an action can be maintained for the *conversion of a chose in action* which has been *pledged as security for a debt*. (*Luckey* agt. *Gannon*, *ante*, 134.)

4. An action to *redeem* is not the only remedy; and where the pledgee has wrongfully disposed of the pledged property, so as to put it out of his power to deliver it, or where upon *payment of the debt* for which it was pledged, and demand for its return, he refuses to return it, it is a *conversion* for which an action will lie. (*Id.*)

5. Where a bailee of goods absolutely refuses to deliver them to the owner on demand; or denies his right to them; or assumes to be himself the owner: or interposes an unreasonable objection to delivering them; or exhibits bad faith in regard to the transaction; a conversion of the property may be inferred. (*Carroll* agt. *Mix*, 51 *Barb.*, 212.)

6. But where the defendant received goods from B., without knowing who was the owner, but having every reason to suppose B. to be the owner, and, on demand being made by a third person claiming to be the owner, did not set up any claim to them, nor dispute the claimant's right, but stated, in substance, that he did not know the claimant was the owner; that the property was left by B., and that he desired the order of his father, or B before delivering the same; or an opportunity to confer with his father in regard thereto; *Held*, that this was not such a refusal as amounted to a conversion of the goods. (*Id.*)

7. In an action to recover damages for the taking and conversion of personal property, an answer alleging that the property was seized by authority of a court appointed under an act of the Confederate congress, during the war, as the property of alien enemies; that after such seizure the property was confiscated and ordered to be sold; and that at such sale the defendants purchased and paid for the same, and hold it under such purchase, does not set up

a valid defense. (*Allen* agt. *Bridgers*, 52 *Barb.*, 604.)

8. A cause of action for the conversion of personal property is assignable, and the assignee may maintain an action thereon in his own name. (*Haight* agt. *Hoyt*, 19 *N. Y.*, 464.) (*Richtmeyer* agt. *Remsen*, 38 *N. Y.*, 206.)

9. A recovery of judgment for the conversion of personal property authorizes an execution against the person of the defendant. (*Wesson* agt. *Chamberlin*, 3 *N. Y.*, 331.) (*Id.*)

TRUSTS AND TRUSTEES.

1. The plaintiffs, as trustees of a railroad company, effected a policy of insurance with the defendants "on any property belonging to the said trust company, as trustees and lessees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on the premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine, Wisconsin." *Held* that a dredge boat belonging to the plaintiffs as trustees, in their employ in the city of Racine, and attached to their wharf where the road terminated, was thereby in the plaintiffs' possession, and annexed to the railroad premises, and therefore covered by the policy. (*Farmers' Loan & Trust Co.* agt. *Harmony Fire & Marine Ins. Co*, 51 *Barb.*, 33.)

2. The act of incorporation of The Farmers' Loan and Trust Company fully authorized the company to accept a conveyance of property from a railroad company, in trust, to secure the payment of an issue of bonds by said railroad company. (*Id.*)

3. Whether such loan and trust company can hold real estate in Wisconsin must depend on the statutes of that state. In the absence of any proof of a law to the contrary, it will be presumed that the company had authority to execute the trusts which by their charter they had power to undertake. (*Id.*)

4. So long as they were allowed to remain in possession and use the railroad property so conveyed to them in trust, they had such an interest as would bring all their property connected therewith, under the terms of the policy. (*Id.*)

5. The mother of the plaintiffs, was entitled, under the will of her deceased husband, to the income of his estate until she should again marry, when the whole estate was to vest in the plaintiffs. She, having married W. permitted him to collect the rents belonging to the plaintiffs. Part of these he deposited in a bank, and the balance he used in his business. Under an arrangement between the mother, acting as guardian of the plaintiffs, and W. he purchased certain premises for the plaintiffs, paying towards the same $4700 of their money in his hands, and assuming the payment of a mortgage of $10,000 then on the premises, and took the title in his own name, but for their benefit. *Held*, that there was a resulting trust in favor of the plaintiffs. (*Schlaefer* agt. *Corson*, 52 *Barb.*, 510.)

6. That W. having, as the agent of his wife, received the rents belonging to the plaintiffs, he was their trustee, and they might follow the fund into his hands, and into any property in which he might invest it. (*Id.*)

7. That W. being insolvent, it did not lie with his creditors to say that the premises should be appropriated to pay their debts because the mother was liable as guardian. (*Id.*)

8. That the equity of the plaintiffs was the oldest, and superior to that of a mere judgment creditor of W. who took his judgment as a means to obtain payment of a debt, and not by way of security for advances made upon the faith of the judgment as security. (*Id.*)

9. In an action brought by the trustees of a charitable or educational corporation to enforce the payment of a subscription for the benefit of the corporation, the subscription being set forth as part of the complaint, wherein the plaintiffs are designated as trustees, &c.—*Held*, that the plaintiffs acted in their representative or trust capacity, and that the costs awarded upon dismissing the complaint could not be enforced against them personally, without a special order of the court. (*Code*, § 317.) (*Slocum* agt. *Barry*, 38 *N. Y.*, 46.)

10. The mere fact, that a trustee as plaintiff in an action does not appear when the case is called, whereby an order of dismissal is taken against him, does not carry with it the legal conclusion of mismanagement or bad faith, under which the ordinary direction dismissing the complaint will be presumed to charge the plaintiff personally with the costs. (*Id.*)

11. In order to charge a trustee personally with costs in an action, there should be a specific application for such

an order, founded upon a notice to the other party, in order that he may have an opportunity to repel the charge of mismanagement or the imputation of bad faith. (*Id.*)

12. When an active trust for the care and management, conveyance and appropriation of personal property has been created, and the instrument creating the trust makes no provision for the compensation of the trustees, they *prima facie*, are entitled to the same commissions as are, by statute, allowed to administrators and executors. (*Ogden* agt. *Murray*, 39 *N. Y.*, 202.)

13. The above rule should, in general, be regarded as just, and, therefore, be adopted, unless there are other controlling reasons which forbid such an allowance. (*Id.*)

14. But when the trustees thus appointed were of the directors of the company whose property was made the subject of the trust, and, as directors, were themselves trustees before such appointment, they come within the rule which forbids the trustee to administer the trust for his own private benefit. (*Id.*)

15. A mortgage upon real property, executed to the mortgagee in trust to collect and apply the principal and interest, is a trust in personal property; and if the trust is perfectly defined, so as not to rest in the discretion of the trustee, his executor may maintain an action for the foreclosure of the mortgage. (*Bunn* agt. *Vaughan*, 5 *Abb., N. S.*, 269.)

16. In such an action a pass-book kept by the deceased trustee, containing entries of payments of interest, may be admitted in evidence. (*Id.*)

UNDERTAKING.

1. An undertaking given to effectuate an appeal under section 334 of the Code, and which recites, that the appellant, feeling aggrieved, &c., *intends to appeal*, &c., is not void as showing by the recital that the undertaking was executed before the appeal. There is no impropriety in the recital of the undertaking, that the party giving it *intends to appeal*. He forms the purpose to appeal, and the giving of an undertaking being an essential constituent to the completion of his purpose, it is not only truthful, but appropriate, to recite the fact in the instrument which is to effect that purpose. The two things are essential parts of one transaction, and are not only to be construed but to be taken together as necessary complements to a thing perfected by their joint agency. (*Forrest* agt. *Havens*, 38 *N. Y.*, 469.)

2. A voluntary bond, not given under legal compulsion but to procure a private benefit, is to be construed more liberally than one given to a public officer, where the rule of strict conformity is held with considerable stringency. (*Id.*)

USURY.

1. An agreement for the *loan of money*, made and consummated in this state by residents thereof, by which the borrower is to give a bond accompanied by a mortgage upon lands in Wisconsin, no place of payment being specified, is governed by the usury laws of New York, and not those of Wisconsin. (*Cope* agt. *Alden*, *ante*, 181.)

2. Where a party is solicited to make a loan, and to procure the means of doing so, must spend time, and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. (*Thurston* agt. *Cornell*, 38 *N. Y.*, 281.)

3. Whether the payment upon a loan of more than the legal rate of interest is usury, depends upon the particular facts of the case, and the intention of the parties; and these are questions for the jury. If paid or received for the loan, or forbearance of the money, it is usury, but, if the excess is for other good and valuable considerations, not interposed as a device to cover usury, the transaction is not usurious. (*Id.*)

4. Where the plaintiff purchased an outstanding mortgage against the defendant, and paid for the same, a usurious contract to make further advances on said mortgage, does not extend to vitiating the mortgage for any part of the money due thereon at the time of the assignment thereof to the plaintiff, but only to so much as might have been advanced under the usurious agreement. The plaintiff's title to the mortgage is perfect under the assignment. (*Kellogg* agt. *Adams*, 39 *N. Y.*, 28.)

5. A usurious contract with the mortgagor by the assignee, which induced him to purchase the mortgage of the mortgagee, forms no part of the consideration for which the mortgagee

assigned the mortgage; and consequently does not affect the assignee's title to the same. (*Id.*)

6. The taking of usury, or including it in new notes by way of renewal of other valid notes, free from such taint, does not prevent a recovery of the sum actually due upon the valid notes, although the original notes were surrendered when the new notes were given. (*Winsted Bank* agt. *Webb*, 39 *N. Y.*, 325.)

7. Where a complaint alleged the making, &c., by the defendants, of six notes, their non-payment at maturity, &c., and the giving of other six notes in renewal thereof upon which the first six notes were surrendered, and stated that the defendants alleged and claimed that the last six notes were void for usury, and the defendants, by their answer, did set up such usury and claimed the first six notes were paid and surrendered, and that the last notes were void for usury, the plaintiff, in opening his case on the trial, admitted that usurious interest was included in the last six notes, whereupon a nonsuit was ordered. On appeal, held that this was erroneous. (*Id.*)

8. The delivery of six notes which were void for usury, was not payment and satisfaction of the six valid notes intended to be renewed thereby. (*Id.*)

9. Upon the facts stated, the surrender of the first six notes was not a discharge of the cause of action, and the plaintiff was entitled to recover the amount actually due. (*Id.*)

VARIANCE.

1. Where there is a variance between the complaint and the proof, in regard to the time of delivery and acceptance of property, which has not misled the defendant, the court in the exercise of its discretion, may direct the jury to find the fact according to the evidence. (*Babbett* agt. *Young*, 51 *Barb.*, 466.)

VENDOR AND PURCHASER.

1. A delivery by a vendor, to a specified carrier, of the goods purchased, in pursuance of the verbal order and direction of the purchaser, is in law, a delivery to the latter and *ipso facto* an acceptance by him of the property. (*Glen* agt. *Whitaker*, 51 *Barb.*, 451.)

2. The parties made a parol agreement at Rochester, for the sale and delivery by the plaintiffs to the defendant of a clover machine, of the value of $375. At the time when the agreement was made, a machine of the value and description of the one mentioned therein was completed, and pointed out to the defendant, who directed the plaintiffs to ship said machine by the New York Central Railroad to S. at Penn Yan. The machine was so shipped, and received by S. and was retained by him with the knowledge of the defendant, and was not returned to the plaintiffs. *Held*, that these facts were conclusive, and sustained the conclusion of the referee that as between the vendors and vendee, the latter accepted the property. (*Id.*)

3. *Held*, *also*, that the rights of the parties were fixed by the delivery of the machine to the carrier, pursuant to the directions of the defendant, and that the title thereby passed to him. And that a letter, subsequently written by the defendant, repudiating the agreement and countermanding the order for the machine, was ineffectual as a countermand. (*Id.*)

4. That in the absence of fraud, or of evidence showing that the machine was not the same he selected, or that it was not in as good condition at the time of delivery, as it was at the time of selection, the purchaser had no right to return it, after it was delivered to the carrier. That the case was the same, in that respect, as if the delivery had been to himself personally. (*Id.*)

5. Under section 97 of the act of congress, passed June 30, 1864, "to provide ways and means for the support of the government, and for other purposes," (13 *U. S. Stat. at Large*, *p.* 270,) which provides "that every person, firm or corporation who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles, and not primarily paid by the vendee, and shall be entitled by virtue hereof, to be paid, and to sue for and recover the same accordingly," prepayment of the duty by the vendor is not a requisite to his claim to recover the same of the vendee, in an action brought for the price of the goods sold. (*Babbett* agt. *Young*, 51 *Barb.*, 466.)

6. By section 94 of that act, the manufacturer is made liable primarily for the payment of the tax; and this liability makes the claim against the ven-

dee as complete as if he had actually paid The effect of section 97 is to cast this liability, ultimately, upon the party purchasing of the manufacturer. (*Id.*)

7. The law merely adds to the certainty of collection, and is but one of the means which congress had power to adopt, to accomplish the end designed. *Id.*)

8. The plaintiffs, on 3d of January, 1867, wrote to the defendants, at M. offering to sell them one hundred barrels of apples, delivered in the railroad cars at Havana depot for $3.50 per barrel, stating the kind of apples and their condition. The apples were to be shipped immediately, and for the price the plaintiffs were to draw on the defendants at sight. The defendants replied by letter, that if the apples were of good size, fair and sound, the plaintiffs might ship them at once. On the 10th of January, the plaintiffs shipped one hundred barrels of apples on the cars, directed to the defendants at M.; the defendants not being present at the time of shipment, to receive the apples, nor seeing them until they arrived at M. They were received by the defendants, at M. on the 12th of January. On opening and assorting them, eighty-two barrels were found to be merchantable, and eighteen barrels rotten and worthless. On the 15th of January, before the assorting was completed, the defendants sent the plaintiffs a check for a part of the price. After they had completed the assorting, they sent the plaintiffs a check for the balance of the price of the eighty-two barrels of sound apples, and refused to pay for the eighteen barrels found to be unsound. The plaintiffs returned the checks, and brought an action to recover the price of the whole consignment.

9. *Held*, that the defendants not having been present to receive or accept the apples when delivered on the cars, and they not having paid for, received or accepted them until they arrived at M. it was a case, not of sale and delivery with warranty, but an executory contract to sell and deliver one hundred barrels of good and merchantable apples. (*Weaver* agt. *Wimes*, 51 *Barb.*, 638.)

10. That the defendants having received the apples, and not having rescinded the contract, on examination and discovery of the defects, by a return, or an offer to return the property, or giving notice of their refusal to receive the same, and that the apples were subject to the plaintiffs order, had waived the alleged defects; and their right to recoup the damages arising therefrom, did not survive such acceptance. (*Id.*)

11. That the defendants did more than this; they affirmed the contract and their acceptance of the apples thereunder, by a tender of payment to the apples which they conceded to be good. (*Id.*)

12. That there having been no delivery with a warranty, it was not a case that should have been submitted to the jury on the questions connected with the recoupment; and the court was right in ordering a verdict for the plaintiffs. (*Id.*)

13. It is well settled that the title to property sold does not pass to the vendee, when any thing remains to be done in order to ascertain the precise property sold, or the price to be paid. (*Camp* agt *Norton*, 52 *Barb.*, 96.)

14. But whether the kind or the quantity of property has been ascertained, so as to pass the title, are facts to be proved in such case, and cannot, ordinarily, arise upon a complaint properly drawn. (*Id.*)

15. In an action by a vendee, against the vendor, to recover damages for not delivering the property sold, it is only necessary for him to aver, in his complaint, the making of the contract, performance or readiness to perform on his part, and neglect or refusal to deliver on the part of the vendor, after demand when demand is required by the contract. (*Id.*)

16. Where the complaint averred that there was a contract made, between the parties for the sale by the defendants to the plaintiffs of two hundred and forty-three bales of cotton at forty-five and three-quarter cents per pound; that on a subsequent day, and while the cotton remained in the possession of the defendants, one hundred and twenty-eight bales were delivered, and that the balance, one hundred and fifteen bales, were destroyed by fire; *Held*, on demurrer, that complaint showed that at the time of the fire the title of all the cotton was in the plaintiffs, and if they desired to get rid of this legal conclusion, it was their duty to aver such facts as would have shown that in law the title had not passed. (*Id.*)

17. There is no presumption of law that property sold has not been separated, weighed or measured, so as to pass the title. If these acts are not done, it devolves on the party insisting on these

omissions, to show them, and thus discharge himself from a liability which would otherwise devolve upon him. (*Id.*)

18 An agreement was made between the parties, by the terms of which the defendants were to send to the plaintiff four hundred and fifty tons of coal, of the kinds specified, at $5.50 per ton, during the season of navigation, after August 6, 1862. The defendants broke the agreement, on their part, in that they forwarded but two hundred and sixty-six and a half tons, and that one hundred and sixty-five and a half tons of the coal forwarded was of an inferior quality. The plaintiff did not refuse to accept the one hundred and sixty-five and a half tons, nor offer to return the same. In an action to recover damages for the non-delivery of the balance of the coal contracted for, and for the inferior quality of the one hundred and sixty-five and a half tons, the referee allowed damages on account of the quantity not delivered, at the rate of $2 a ton, which was the advance in the price, and refused to allow damages on account of the bad quality of the one hundred and sixty-five and a half tons delivered, on the ground that the plaintiff did not refuse to accept it, nor offer to return it. *Held*, that the conclusion of the referee was correct, and the judgment directed by him was affirmed. (*Leavenworth* agt. *Packer*, 52 *Barb.*, 132.)

19. *Held, also*, that the referee was right in allowing the defendants to recoup, not only the advances made by them for freight and tolls paid for the plaintiff, but also the balance due for the coal actually shipped, over and above the sum advanced by the plaintiff in payment therefor. (*Id.*)

20. Upon an executory contract for the sale and delivery of personal property, the general rule is, that where the article furnished does not correspond with the article promised in the contract, the vendee, if the defect is clearly apparent, may refuse to accept and it is his duty in self protection to refuse to accept it. If the defect is not at first apparent, he is entitled to an opportunity, and a reasonable time, to ascertain its defects. If defects are then discovered, he is bound to give notice to the vendor, or to offer to return the property. (*Id.*)

21. The retention, or use, or conversion of the property, by the vendee, is an admission on his part, of his satisfaction, that the article received is in conformity to the agreement; and such use or conversion without notice of defects, is a legal waiver of all objections, and estops him from the right to recover damages for its defects. (*Id.*)

22. The sale of coal dust, to be used in the manufacture of brick, with a warranty, that it was free from soft coal dust, accompanied with the information, that, if mixed with soft dust, it would destroy the brick proposed to be manufactured, renders the seller liable for the injury to the brick sought to be manufactured, by the presence of such soft coal dust. The rule as laid down in *Passenger* agt. *Thorburn*, (39. *N. Y.*, 69) approved. (*Milburn* agt. *Belloni*, 39 *N. Y.*, 53.)

23. A party contracting to sell a chattel not in possession at the time is not liable upon an *implied* warranty of title. (*Scranton* agt. *Clark*, 39 *N. Y.*, 220.)

23. Should such chattel subsequently come to his possession by purchase, and be transferred to a *bona fide* purchaser, the title would be complete in such purchaser, and would not inure to the benefit of the party first contracting to purchase the same. (*Id.*)

25. Where the contract for the delivery of two boat loads of wheat is entire in form, it may be divisible in its execution by the concurrence of the parties; and, where, on the delivery of one load, the seller demands payment for the same, and the buyer acquiesces in the demand, and fixes upon a time of payment, the delivery of such load may be deemed complete. (*Winne* agt. *McDonald*, 39 *N. Y.*, 233.)

26. The title to such wheat having become vested in the vendee, any advances he might, in good faith, obtain on the same, by delivering the measurer's return, and bill of lading, would pass the title to that extent. (*Id.*)

27. A stipulation to deliver "between" certain days excludes the last day named. Under a contract to purchase merchandise to be delivered at the seller's option, "*between*" the date of the contract, and a specified day, four days' notice of delivery to be given,—the last day for the delivery is the day before the specified day fixed by the contract. (*Fowler* agt. *Rigney*, 5 *Abb. N. S.*, 182.)

28. In order to sustain an action for refusal to receive the merchandise, the seller must give the four days' notice, on or before the fifth day before the day specified in the contract. (*Id.*)

VENUE.

1. An affidavit to change the venue, is sufficient, where it states that the witnesses reside in the county. It is unnecessary to specify the city, town or village. (*Bleecker* agt. *Smith*, *ante*, 28.)

VICIOUS ANIMALS.

1. Where the defendant negligently permitted his horse to go loose, and unattended, upon the sidewalk of a populous street in the city, where, in passing he kicked the plaintiff and injured him, *held*, that he was liable. (*Dickson* agt. *McCoy*, 39 *N. Y.*, 400.)

2. To make the owner responsible, it is unnecessary to allege the viciousness of the horse, in committing the injury, except in case where, but for the vice of the animal, the owner would be free from fault. (*Id.*)

3. It is such negligence, for the owner of a horse to turn him loose, to go from the stable into the street of a city, unattended, as will make him liable for all injuries occasioned thereby. (*Id.*)

WAREHOUSEMEN.

1. Warehousemen are bound, like all bailees who receive a benefit from the bailment of goods, to exercise ordinary care and diligence, and are responsible only for ordinary neglect. (*Titsworth* agt. *Winnegar*, 51 *Barb.*, 148.)

2. The basis of a claim against a warehouseman for neglect in the care of goods, is that he is in possession of the goods as a depositary for hire. It is in respect to this right to receive compensation for storage that he is liable for injury to the goods, or their loss in consequence of, or arising from, his neglect (*Id.*)

3. A carrier of goods by canal, when within about a mile and a half of the place of delivery, with the goods, presented the bill of lading to the warehouseman to whose care the goods were consigned, and informed him that his boat could proceed no further, on account of the ice in the canal, and requested the warehouseman to pay his charges for freight. The latter thereupon paid such charges, and gave a receipt on the shipping bill, for the goods, and the boat was left in charge of a third person. Subsequently the owner paid the warehouseman his charges on the property, and his advances to the carrier for freight. The goods, while remaining on the boat, were damaged by water. *Held*, that when the warehouseman's charges and advances for freight were paid by the owner, the latter was entitled to take immediate possession and control of the goods, and they were not, after that time, subject to any lien or claim of the warehouseman for storage, or other services, nor was he liable for any loss or damages happening to such goods. (*Id.*)

4. *Held*, *also*, that there was no consideration for any contract by the warehouseman to take care of the goods, and none could be implied. That there was no duty, on his part, to take care of the property, because there was no assumpsit to pay for such care, and no lien in his favor could exist upon property remaining in the possession of the carrier. (*Id.*)

WASTE.

1. Although the common law doctrine of *waste* is not, in its strictness, applicable to the condition of things in this country, such as cutting of trees or timber by a tenant as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is *waste* for which an action will lie, in equity, for the prevention of such injury, by injunction, before it is committed, or at law, for the recovery of damages, by the remainder-man, after the injury is done. (*McCay* agt. *Wait*, 51 *Barb.*, 225.)

WILL.

1. A testator, after directing the payment of his debts, by the second and third clauses of his will, gave to his wife all his personal property, and all his real estate during her life time. By the fourth, fifth and sixth clauses he gave and bequeathed to the "legal heirs" of his brother A., deceased, and to the "legal heirs" of his sister M., deceased, and to the "heirs" of his brother in-law, W. V., all his real estate at the death of his (the testator's) wife "to be divided equally between each of the heirs above named," after the decease of his said wife. The testator died without issue, and his wife afterwards died. W. V. was still living. The testator's wife was a sister of W. V., the father of the defendants, and the latter, upon the death of their father, would be his heirs at law. In an action for the construction of such will; *Held*, that the real estate mentioned in

the will belonged to, and was owned in common by the parties to the suit, and that each of the twelve plaintiffs and the two defendants was entitled to one fourteenth thereof. (*Vannorsdall* agt. *Van Deventer*, 51 *Barb.*, 137.)

2. *Held, also*, that the intent of the testator was to give to his wife his real estate during her life, and after her decease to give the same in equal portions to the three classes of persons who should be heirs of his brother A., of his sister M., and of his brother-in-law W. V.; the word "heirs," so far as related to the heirs of W. V., being used as synonymous with *children*; and in respect to the heirs of A. and M. there was no contingency in respect to the persons to take, and the estate would vest immediately upon the death of the testator. (*Id.*)

3. No unvarying rule, as to the amount of proof necessary to establish the execution of a will can be laid down which is to control every case, as the circumstances of each case must differ from any other. Hence it becomes the duty of the court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and if it is, to receive the same. (*Rider* agt. *Legg*, 51 *Barb.*, 260.)

4. Where all the three subscribing witnesses to a will executed since the Revised Statutes took effect are dead, proof of the signatures of two of them, with a perfect attestation clause, and other circumstances tending to favor the probability that the will is genuine, are sufficient, after a great lapse of time, to justify the reception of the will as evidence, without proof of the signatures of one of the subscribing witnesses and the testatrix. (*Id.*)

5. A testator, by his will, gave and bequeathed to his executors, $1200, to be taken from any funds belonging to his estate, directing them to invest the same in the purchase of a dwelling house and lot, such as should be selected by his wife, and gave her the use of such house and lot for life. And he directed his executors, after her death, to sell the same, and pay over the proceeds of the sale, in equal shares, to the plaintiffs and a missionary society. This, together with other provisions of the will for his wife, the testator declared to be upon the condition that she should accept the same in lieu of dower, thirds or other share of his estate. The wife survived the testator about a month, and died before the probate of the will, and without having elected to accept the provisions thereof for her benefit, in lieu of dower, &c.; and the executors did not purchase any house and lot under the trust:

6. *Held*, that the plaintiffs became entitled, absolutely and unconditionally, to one half of the fund of $1200 given to the executors in trust, upon the death of the widow of the testator, payable at the expiration of one year next after the issuing of the letters testamentary. (*American Bible Society* agt. *Hebard*, 51 *Barb.*, 552.)

7. *Held, also*, that the plaintiffs took, as legatees merely, the bequest, discharged from the incumbrance of the trust. That their right to one half the contemplated fund was a vested right from the beginning, or, in any event, at the death of the widow. That an action in the nature of a legal action, to recover the legacy, could have been maintained at the end of a year from the granting of letters; and that, as more than six years had elapsed since the expiration of the year, before the action was commenced, the claim was barred by the statutes of limitations. (*Id.*)

8. "Advancement" and "advancements," are the terms used in the law dictionaries, and in our statutes, to designate money, or property, given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances," is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan, or a gift, or money advanced to be repaid conditionally. (*Chase* agt. *Ewing*, 51 *Barb.*, 597.)

9. A testator, by the third clause of his will, devised and directed as follows: "Whatever advances I have made to any of any children, or to the husbands of any of my children, for which any receipts or other evidences of indebtedness may be found among my papers after my decease, I hereby give and devise to my said children, to each one the advance made to each; my intention being by this that such receipt or other evidence of indebtedness, shall not be collected or enforced against them, or either of them, who may have signed the same, but that the same, be given up to that one of my children, who may have in person, or whose husband may have signed the same, the receipt or other evidence as aforesaid of each to each." *Held*, that the entire tenor and scope of the clause,

showed clearly that the testator had in view not gifts and advancements previously made as such, but advances only, in the nature of loans, and for which he held vouchers whereby the claims could be enforced. And that it embraced, under the term "evidence of indebtedness," a mortgage given by one of the testators children with her husband, for money borrowed of the testator. (*Id.*)

10. *Held, also*, that the mortgage purporting on its face to be given "in consideration of the sum of $2166, to them [the mortgagors] duly paid," and reciting, in the condition, that "this grant is intended as a security for the payment of $2166, payable in one year from the date hereof, with interest, which payment, if duly made, will render this conveyance void," it was of itself evidence upon the trial, not only of the indebtedness, but also of the default in payment; and was therefore the identical thing described in the third clause of the will—an evidence of indebtedness for "advances;" and could not be enforced. (*Id.*)

11. *Held, further*, that in an action by the executor of the mortgagee, to foreclose such mortgage, the plaintiff could not be allowed to give in evidence the declarations of the testator, for the purpose of proving that the indebtedness secured by the mortgage was a loan and not an advancement to the defendants, or one of them. (*Id.*)

12. And that inasmuch as, had the action been brought by the testator in his lifetime, his parol admissions, or declarations, that the money had been furnished by way of advancement, and not as a loan, would have been inadmissible, on the ground that they would contradict the plain terms and legal intendment of the mortgage, they were equally inadmissible in the action of foreclosure brought by his executor. (*Id.*)

13. Conversations and declarations of a testator, in favor of the executor are never allowable in actions between the executor and third persons, unless under some peculiar circumstances. (*Id.*)

14. Construction of the will of the late William Bostwick, deceased—a resident of New Haven, Conn., directing certain amounts to be paid to each of several charitable and religious societies, out of the trust fund, by his executors. (*White* agt. *Howard*, 52 *Barb.*, 294.)

15. A testator directed, by his will, that all his estate that might be left, after paying certain expenses and legacies, should remain in the hands of his executors, or under their control, for the use of his wife and children while under age; and after his youngest grand child should have arrived at the age of twenty-one years, he directed that the same should be divided among his children, share and share alike. *Held*, That this provision was not void as suspending the power of alienation for more than two lives. (*Burke* agt. *Valentine*, 52 *Barb.*, 412.)

16. That the executors took no estate in trust. Although they were directed to convert the estate into money, and to hold and manage the proceeds, the interest and estate was in the wife and minor children. (*Id.*)

17. That each child had a share of the property while a minor, and the estate of such child ceased on its reaching majority, and the share held by such child thereupon vested in the other children who were minors, and the wife. (*Id.*)

18. That a daughter of the testator, who was of full age at the time of his death, and died before the youngest child arrived at the age of twenty-one, never had such an estate in the lands of the testator, as to vest in her husband an estate as tenant by the curtesy; she having no possession, and not being entitled to any possession, under the will, until the youngest child should become of age. (*Id.*)

19. A testator, by his will, devised certain premises in the city of New York to his widow, daughter and son, "in equal portions, to them and their heirs forever, to have and to hold said estate upon the conditions, qualifications and reservations herein contained, and subject to a trust to be executed by my said executors, who are hereby appointed trustees for the purpose." The executors were required to have the control of the property for the purposes of their trust, to enable them to execute the duties of their appointment; to rent the premises: to collect the rents; and, after paying the taxes and premiums for insurance, to pay certain designated annuities to various persons, including the father and sisters of the testator, amounting in all to the annual sum of $850, apply the balance towards the payment of two mortgages, one on the property yielding such rents, the other upon a farm in Connecticut, devised to the testator's son, and at the expiration of the trust, to surrender the property to the persons to whom it was devised, subject to the performance and dis-

charge of all these duties: *Held*, that these provisions of the will created a trust in the executors. (*Killam* agt. *Allen*, 52 *Barb.*, 605.)

20. That such trust was illegal and void, by reason of the limitation upon its existence and continuance which the testator had imposed upon it, viz. the payment and extinction of the mortgage; which might suspend the absolute power of alienation beyond the period allowed by law. (*Id.*)

21 That the annuities to the father and sisters of the testator could be sustained, as charges upon the real estate, notwithstanding the failure of the trust. (*Id.*)

22. Where the testator by the terms of the will gave to his wife and to his niece all his real and personal estate, property, assets and effects, subject to his debts; and directed his executors to convert the same into cash, &c., and invest for each of the legatees one half of the proceeds; and gave to each the use and enjoyment of so much of the interest arising therefrom as should be necessary and proper for their respective maintenance and support; and directed, that, if the interest of their respective parts of the proceeds should not be sufficient for their respective support, a portion of the principal should be applied for that purpose, and that, in case either the wife or niece should die without heirs, the share of the one so dying, should go to the heirs-at-law of the testator's mother,—*held*: That it was the duty of the executors to sell the real and personal estate of the testator, and invest the proceeds thereof, one half for the benefit of the widow, and the other half for the benefit of the niece; and that the executors should invest as trustees for the benefit of their *cestuis que trust*, and that they, as trustees, should receive the interest and pay the same over to the party entitled. (*Bundy* agt. *Bundy*, 38 *N. Y.*, 410.)

23. That the widow and legatee, being appointed executrix, with other executors, of the will, cannot act both as trustee and *cestui que trust*; and therefore, in respect to her estate, the other executors must take exclusive control and management of the half of the proceeds of the estate bequeathed. (*Id.*)

24. That in respect to the half bequeathed to the niece, the widow must join with the other executors in the management and control of that half. (*Id.*)

25. That the executors must retain the control of the estate then to be invested, under the will, and manage the same. (*Id.*)

26. That where the will does not authorize the executors or trustees to determine the amount to be paid for the support of the beneficiary, and does not authorize the beneficiaries themselves to determine the amount, such amount must be fixed by the court. (*Id.*)

27. That the provision in the will providing that, in case the said widow or niece "die without heirs," &c., the proceeds &c., invested for either of them so dying, should be equally distributed among the heirs-at-law of the testator's mother, referred only to the heirs of the body or lineal descendants. (*Id.*)

28. It is essential to the due execution of a will, under the laws of this state, that the witnesses, who are to attest the subscription and publication thereof by the testator, should sign the same, after the subscription by him. (*Jackson* agt. *Jackson*, 39 *N. Y.*, 153.)

29. In respect to the subscription by the testator in the presence of the witnesses, and his declaration, that the instrument is his last will and testament, which the statute requires to be simultaneous, it is sufficient that they be on the same occasion, and it is not material, that the declaration immediately precedes the subscription. (*Id.*)

30. Where the subscription by the testator is by his mark, it is the *mark*, and not the name which may be written around it by another, which constitutes subscription by the testator. Hence, it is immaterial whether such name is written before or after the mark is made. (*Id.*)

31. The writing of the testator's name, with the words "his mark," done by a third person, to identify the testator's subscription by a mark, is not the "signing of the testator's name by his direction," as a subscription of the will, which the statute contemplates in prescribing the requisites to due execution. (*Id.*)

32. The attestation clause is no part of the execution of the will, and its form is not essential. As a memorandum of facts, then transpiring, it is very useful, and, on the death, of the witnesses, it may be *prima facie* evidence, that the formalities, which it recites, were enacted, but it is not indispensable. (*Id.*)

33. The circumstance that the testator died within a few hours after the making of his will, does not alone

warrant an inference of incapacity. (*Id.*)

34. And the fact, that the testator, by his will, gives his whole estate, amounting to $30,000, to a second wife, except the small sum of $500, which he gives to his only child (his son by his first wife), however it may seem unreasonable or unjust, is not alone sufficient to establish an allegation, that the will was executed under undue influence. (*Id.*)

35. A will destroyed in the life-time of the testator by the testator himself, acting under the undue influence of his son, may be admitted to probate, on establishing facts showing the existence and due execution of the will, and its destruction by reason of such undue influence. (*Voorhees* agt. *Voorhees* 39 *N. Y.*, 463.)

36. A deed of the same premises by the testator to his son, which was devised by his will to the wife, may likewise be set aside, on proving that it was executed under the undue influence of the son, who also procured the destruction of the will. The testator himself, while under undue influence, may be made the instrument of improperly destroying his own will. (*Id.*)

WITNESSES.

1. On the trial of an action brought by executors, for services of their testator as an *attorney and counsellor at law*, the defendant being a witness on his own behalf, should not be permitted to give the substance of a *written* any more than that of a verbal communication to him from the testator; even if the loss of the written communication is satisfactorily made out. (*Graham* agt. *Chrystal*, *ante*, 279.)

2. Besides, it would hardly be safe to allow the contents of a lost written instrument to be proved by such witness, who stated in answer to a question having reference to the writing, that "his recollection was too vague and shadowy—he thought that perhaps he might state the substance." (*Id.*)

3. Where plaintiffs sought to impeach two of the defendants witnesses, by witnesses who swore that they had known them in former years: that their character was bad, and though they knew nothing of them for eight or ten years prior to the trial, they would not believe them under oath: *Held*, that the evidence was properly admissible. The rule is, that if it is shown by the impeaching party that the character of the witness at a former period of his life had been bad, and thus a presumption is raised that it had so continued, it is in the power of the party thus sought to be impeached, to show that his present character is good, and thus repel the presumption. (*Id.*)

4. On the trial of an action brought for services as an *attorney and counsellor at law*, where the attorney was on the stand as a witness, and had testified that an appeal in a cause was taken to the general term, under the defendants direction; the defendant's counsel then asked the witness the following question in reference to that appeal: "Was there anything to argue?" The question being objected to was excluded by the court, and the defendant excepted:

5. *Held*, no error. The obligation of the attorney to be in attendance, by himself or counsel, was the same in either case, and the fact that there was nothing to argue in the sense intended by the question, would have been no proper ground of inference that it was not in fact argued, in the legal sense of submitting the case to the general term for decision. (*Case* agt. *Hotchkiss*, *ante*, 283.)

6. A party *examines an adverse party*, under §§ 390, 391 and 392 of the Code at his peril; and whatever evidence is taken, whether before or at the trial, without objection, is competent, and may be used notwithstanding the restriction of § 300. (*Barry* agt. *Galvin*, *ante*, 399.)

7. Where a memorandum made by a witness in his memorandum book of what took place at an interview was made on the evening on the day on which the interview occurred, and corroborates the evidence given by the witness, on the trial, it may be received and relied upon for that purpose. (*Townsend Manufacturing Co.* agt. *Foster*, 51 *Barb.* 346.)

8. The just administration of the laws requires that where there is a decided preponderence of evidence upon one side, that should always be followed, where the witnesses on both sides are equally candid, intelligent and positive in their statements. (*Id.*)

9. Where a witness states that a letter was lost and he cannot tell what has become of it, that is sufficient evidence, *prima facie*, of loss, to admit parol evidence of its contents; where the witness is not cross-examined for the purpose of ascertaining where he kept his

letters, or whether he preserved them at all, or what search he has made; but the objection is that there is no evidence that it has been destroyed, or that the witness has searched for it where he usually keeps his letters (*Voorhees* agt. *Dorr*, 51 *Barb.*, 580.)

10. Dogs, in general, have no fixed or general market value. If there is any particular breed or class of dogs which is generally or usually sold in market, and have established some fixed or general market value, opinions of witnesses are as competent to fix the value of such breed or class as that of any other marketable property. (*Brown* agt. *Hoburger*, 52 *Barb.*, 15)

11 Opinions as to value, founded on the mere taste or fancy of the owner, or the witness, are not competent. And for this reason opinions in regard to the value of dogs which have no standard or marketable value, being necessarily fanciful, are not competent. (*Id.*)

12. In order to render opinions as to the value of a dog competent evidence, it should first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed, or possessing some peculiar qualities which make him an animal usually vendible at some proximately regular price. (*Id.*)

13. Under the law admitting parties to testify in their own behalf, it is well settled, that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was. (*Thurston* agt. *Cornell*, 38 *N. Y.*, 281.)

14. In an action against the heirs at law and administrators of a deceased, to compel the specific performance of an alleged agreement by the deceased to convey land to the plaintiff, the plaintiff is entitled to be sworn as a witness on his own behalf, although he is not competent to testify to transactions had with the deceased personally. (*Card* agt. *Cord*, 39 *N. Y.*, 317.)

15. The refusal to permit him to be sworn cannot be held an immaterial error, not calling for the reversal of the judgment, upon a conjecture or presumption that he could not have testified to any facts material to his case, because it is found affirmatively that the contract relied upon is not proved. (*Id.*)

16. *Non constat* that he could not have given testimony to facts other than transactions had with the deceased personally, which, as against the heirs at law, would have tended to prove the existence and binding force of the contract alleged. (*Id.*)

17. When a witness states a particular fact, which it is material for the party who called him to controvert, the latter is at liberty to prove the truth in respect to such fact, even though such proof would tend to affect the credit of the witness. Hence when a plaintiff's witness, on cross-examination, testified to a promise on the part of the plaintiff to reward him if he should succeed in the action, it was held error to exclude evidence on the part of the plaintiff (who had been a witness in his own behalf) to contradict this testimony:

18. The rules applicable to the impeachment of witnesses—stated. (*Beals* agt. *Kyle*, 5 *Abb. N. S.*, 232.)

19. In an action for damages caused by overflowing the land of the plaintiff, it is competent to ask a surveyor who had made a survey and map of the ground, how much more land would be overflowed at a given height of water. It is also competent to ask the plaintiff how long the water would usually be in going off? (*Phillips* agt. *Terry*, 5 *Abb. N. S.*, 327.)

20. To ascertain the value of a growing crop, damaged by the overflow of water, it is competent to ask a witness conversant with the growth of such crops, how much, in his opinion, a given field would yield per acre. (*Id.*)

21 A mere objection to such a question, on the ground that it calls for the opinion of the witness, does not avail to sustain an exception on the ground that the witness was not competent as an expert. (*Id.*)

WRIT OF PROHIBITION.

1. A writ of prohibition issues, to forbid a court and party to whom it is directed, from proceeding in any matter designated, then pending before it. It will lie to prevent the exercise of unauthorised power by an inferior tribunal, in cases where it has jurisdiction, as well as where it has not jurisdiction. (*Sweet* agt. *Hulbert*, 51 *Barb.*, 312)

2 The writ does not issue, of course: it is always in the discretion of the court, and should not issue where the party has a complete and adequate remedy at law. (*Id.*)

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COURT OF APPEALS.

DECISIONS RENDERED JUNE, 1869.

Judgment affirmed.

Keefe agt. The People.

Judgment affirmed with costs.

Waring agt. Ayers.
Fake agt. Smith.
The American Bible Society agt. Hebard.
Erickson agt. Smith.
Cocks agt. Rhinelander.
Coyle agt. The City of Brooklyn.
Callanan agt. Van Vleck.
Mills agt. Mills.
Von Beck agt. The Village of Rondout.
Swan agt. Brotzman.
Walsh agt. Kelly.
Buck agt. Briggs.
Connolly agt. Poillion.
The Phœnix Bank agt. Donnell.
Bowman agt. Tallman.
Mentz agt. The Second Avenue R. R. Co.
Measmore agt. The New York Shot and Lead Co.
Seeley agt. Starbuck.
Kelly agt. Roberts.
White agt. The Auburn City Bank.
Gould agt. Gold.
Reid agt. Murray.
Burns agt. Erber.
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Gerard agt. Prouty.
Mason agt. Lord.
Pardee agt. Estey.
Bradley agt. Aldrich.
The People, ex rel., agt. York.
Olyphant agt. McNair.

Rundell agt. Lake.
Freer agt. West.
Oliver agt. Bratt.
Crook agt. Andrews.
Boynton agt. Boynton.

Order affirmed with costs.

The People, ex rel., Lowell agt. The Board of Town Auditors of the Town of Westford.
The Town of Gravesend agt. Hoffman.

Order affirmed and Judgment absolute for defendant, with costs.

Dodge agt. Wellman.
Haydock agt. Stow.
Horton agt. Cook.

Order affirmed and Judgment final for defendants, with costs.

Marsh agt. Falker.
Binck agt Wood.

Order affirmed with costs, and Judgment absolute for plaintiff, with costs; damages to be assessed.

McDonald agt. Walter.

Order affirmed with costs, and Judgment absolute for plaintiff, with costs damages to be assessed.

Burrill agt. Root.
Burrill and another agt. Root.

Order affirmed and Judgment absolute for plaintiff, for the value of the buildings, with costs.

Wray agt. Rhinelander.

Judgment reversed. As the original plaintiff is dead, it is without costs, since no new trial is ordered.

Comstock agt. Dodge.

Judgment reversed, new trial ordered, costs to abide event.

Stanley agt. Miller.
The Kingston Bank agt. Etlinge.
Cromwell agt. Hewitt.
Rogers agt. Phillips.
Westbrook agt. Willey.
Gandolfo agt. Appleton.

Order reversed and Judgment absolute for plaintiff on the verdict, with costs.

Chapman agt. The City of Brooklyn.

Order reversed, and Judgment for the plaintiff on the verdict affirmed, with costs.

Cowdrey agt. Carpenter.

Judgment reversed and new trial ordered unless plaintiff stipulate within thirty days from the entry and service of this order to take judgment for the amount of the Dolan judgment and costs, excluding extra allowance. If he so stipulate, judgment of affirmance for that amount; in either case without costs on appeal.

Bostwick agt. Beiser and another.

Judgment reversed; plaintiff declared to be entitled to the whole estate of the decedant according to the will, with costs of both parties to be paid from the estate

Cotheal agt. Cotheal.

Judgment reversed and new trial ordered, unless plaintiff deduct $145.72, with interest from the date of the Sheriff's levy, without costs of appeal to either party.

Noble agt. Kelly.

Judgment of the General and Special Term reversed with costs and judgment for plaintiff on the verdict, with costs.

Lee agt. The Village of Sandy Hill.

Order reversed with costs, and proceedings remitted to the Supreme court.

Sudlow agt. Knox.

DECISIONS RENDERED SEPTEMBER, 1869.

Judgments affirmed, with costs.

Beard agt. Jackson.
Anderson agt. Parks.
Penman agt. Slocum.
Richmond agt. Banker.
Miller agt. President, &c. of Junction Canal Co.
Eaton agt. Reed.
Gates agt. Preston.
Comstock agt. Buchanan.
People ex rel. Crowell agt. Lawrence.
Hamlin agt. Allen.
Commercial Bank of Rochester agt. City of Rochester.
Hutchins agt. Munyer.
Mitchell agt. Pepoon.
Ford agt. Coats.
Foot agt. Harrington.
Palmer agt. Avery.
Marvin agt. Marvin.
People *ex rel.* Lumley agt. Lewis.

Ricard agt. Sanderson.
Groff agt. Maynard.
Jones agt. O'Reilly.
Gurney agt. Sharp.
Marsh agt. Holbrook.
Mills agt. New York and Harlem Railroad Company.
The People *ex rel.* Erie Railway Company agt. Beardsley.
Rankin agt. Fitch.
Gray agt. City of Brooklyn.
Crujer agt. McLaurie.
Barber agt. New York and Central Railroad Company.
Converse agt. Griswold.
Perrin agt. New York Central Railroad Company
Russ agt. Poultney
Hyatt agt. Trustees of Village Rondout.
Fowler agt. Seaman.
Wheeler agt. Garcia.
Stanny agt. Bowen.
Moore agt. Little.

Judgments reversed, new trials ordered, costs to abide event.

Pomeroy agt. Reed.
Burt agt. Burt.
Norris agt. Kohler.
Litchfield agt. Vernon.
Thompson agt. Bull.
Turk agt. Ridge.
Rooke agt. Atwood.
Ross agt. New Amsterdam Fire Insurance Company.

Appeals dismissed, with costs.

Kelly agt. Corn Exchange Bank.
Taber agt. Gardner.

Orders of General Term reversed, and judgments on reports of referees affirmed, with costs.

Campbell agt. Cypress Hill Cemetery.
Sevens agt. Daniels.
Wegman agt. Childs.

Judgments affirmed.

People agt. John Park *et. al.*
Leachout agt. The People.

Judgment affirmed with costs, and five per cent. damages

Slade agt. O'Farrell.

Orders affirmed, with costs.

The American Life Insurance and Trust Co. agt. Van Epps.
In re John M. Quackenbos Bonsteel agt. Frederich.
Brooks agt. Berry.
Tanton agt. Groh.

Judgment of General and Special Term reversed, and judgment ordered for plaintiff, with costs.

Latten agt. McCarthy.

Reargument ordered.

Nicholson agt. Erie Railway Company
Hart agt. Erie Railway Company.
Sands agt. Newell.
Leonard agt. New York, Albany and Buffalo Electric Telegraph.
Hernch agt. Wolverton.

SPECIAL JUDGMENTS.

Order of General Term affirmed, but modified so far as it dismisses the complaint, and new trial is ordered.

Andrews agt. Shaler.

Costs to abide event.

George agt. Shaffer.

Decree affirmed, with costs.

Collier, executor agt. Munn.

Judgment of General Term reversed, with costs; record to be remitted to the Supreme Court.

Stephens, *et. al.* agt. Phenix Fire Insurance Company of Hartford.

Judgment of General Term reversed; judgment of Special Term affirmed, and leave given to defendant to answer within twenty days after notice of this order, on payment of costs of General Term and of this court.

Seyer, Jr. agt. Mali *et. al.*

Appeal dismissed, with costs.

Folger *et. al.* agt. Fitzhugh *et. al.*

Judgment of General Term of Supreme Court reversed, and judgment of the Oyer and Terminer affirmed, and cause ordered remitted to the Supreme Court for execution.

The People agt. Thompson.

Judgment of the General and Special Term reversed, with costs of appeal to this court and of the General Term, and $10 costs of motion at Special Term.

Van Alstyne agt. Freday *et. al.*

Judgment affirmed, with costs.

Kline agt. Vandeveer.

Judgment affirmed with modifications stated in the opinion of the court; costs of both parties on the appeal to be paid out of the fund; judgment to be settled by Judge WOODRUFF.

Boerum *et. al.* agt. Schenck.

Judgment reversed and new trial ordered, unless plaintiff remits $911, *and interest from the date of the verdict; if he so remits, judgment affirmed for residue, without costs on appeal.*

Hardy agt. Jaudon.

Orders of General Term reversed, and order of Special Term affirmed, with costs.

Drake agt. Goodridge.
Clark agt. Goodridge.

Judgment reversed, and judgment ordered for defendant on the submission, with costs.

Sackman *et. al.* agt. Bennet.

Order of General Term reversed, and judgment of Special Term affirmed, with costs.

Adams agt. Fox, executor.

Judgment reversed, and judgment for defendant.

People *ex rel.* Bradley agt. Stephens.

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